No. 2736

United States
Circuit Court of Appeals
For the Ninth Circuit.

TACOMA RAILWAY AND POWER COMPANY,
a Corporation,
Plaintiff in Error,

vs.

WILLIAM COTHARY and MARGARET COTHARY, Husband and Wife,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[1*]

In the District Court of the United States, Western District of Washington, Southern Division.

No. 1590.

WILLIAM COTHARY and MARGARET COTHARY, Husband and Wife,

Plaintiffs,

vs.

TACOMA RAILWAY AND POWER COMPANY, a Corporation,

Defendant.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in this cause to be filed in the office of the clerk

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*Page-number appearing at foot of page of original certified Record.

of the United States Circuit Court of Appeals for the Ninth Circuit under the Writ of Error to said Court, including the following pleadings, proceedings and papers, to wit:

Complaint;

Answer to complaint;

Reply to answer;

Verdict;

Judgment;

Petition for new trial;

Order overruling motion for new trial;

Order extending time for filing proposed bill of exceptions;

Bill of exceptions as settled by the Court, with order settling same;

General order continuing court matters over term;

Stipulation to withdraw original bill of exceptions to amend same to conform with amendments proposed by plaintiff; [2]

Order allowing withdrawal and amendments of proposed bill of exceptions;

Assignment of errors;

Petition for writ of error;

Order allowing writ of error;

Bond on writ of error and approval of same.

Omitting all endorsements, verifications, acceptances of services, and file-marks and captions.

J. A. SHACKLEFORD,
F. D. OAKLEY,
Attorneys for Plaintiff in Error.

(Filed Jan. 7, 1915.)

[Stipulation That Original Exhibits be Sent Up, etc.]

IT IS HEREBY STIPULATED BY AND BETWEEN THE PARTIES HERETO, that the original exhibits may be sent up to the Appellate Court for the inspection of that court, and that said original exhibits are not to be printed or copied into the record.

J. A. SHACKLEFORD and
F. D. OAKLEY,
Attorneys for Plaintiffs in Error.
TEATS, TEATS & TEATS,
Attorneys for Defendants in Error. [3]

Complaint.

Plaintiffs complaining of the defendant, say:

I.

That the plaintiffs are at this time and have been at all times herein mentioned, husband and wife, and citizens of the State of Washington, residing at Wilkeson, Pierce County.

That the defendant, Tacoma Railway & Power Company, is a corporation organized and existing under the laws of New Jersey, owning and operating a street railway system in the city of Tacoma.

II.

That the city of Tacoma is a city of the first class with powers to grant by ordinance the right and privilege to the defendant street-car company, to operate its cars to and into the parks of the city of

Tacoma; and also to regulate by ordinance the speed of the cars of the defendant company, while being operated over the streets and in the parks in said city of Tacoma. And that on the 20th day of July, 1913, and for some time prior thereto, the defendant company was operating, among its several lines in the city of Tacoma one known as the Point Defiance Line, which ran from the business center of the city of Tacoma, into Point Defiance Park. That the said company was granted in May, 1905, by Ordinance No. 2389, granting the right and privilege to the defendant company to construct and operate its said street-cars to and into the Point Defiance Park and said ordinance in *in* words and phrases as follows:

> "An ordinance granting to the Tacoma Railway & Power Company, its successors and assigns, the right to erect, maintain and operate an electric street railway line within the confines of Point Defiance Park and City of Tacoma, Washington." [4]

And that by said ordinance the said defendant company was required to maintain fences and gates along said line when necessary; and that the defendant company has maintained said fences and said gates and among the gates maintained by the Tacoma Railway & Power Company along its line in Point Defiance Park, is one at the Nereides Bathhouse and said gate is a revolving gate for use by the public and through which one person at a time can pass.

That on the 20th day of July, 1913, and for some

time prior thereto, the said city of Tacoma had made and provided by Ordinance No. 2252, which is an ordinance regulating the speed of street-cars on the streets and highways and parks of the city of Tacoma, that no street-car running on the streets, highways and parks of the city of Tacoma shall attain a higher rate of speed than twenty miles an hour, where double tracks are used.

III.

That on the 20th day of July, 1913, and for some time prior thereto, the defendant, Tacoma Railway & Power Company, ran into the said Point Defiance Park, a double track and about one month prior to the 20th day of July, 1913, the said company moved its eastern track or out-bound track, a distance of about four feet closer to the said gate herein mentioned, which left only a clearance, when a car was on said track opposite the gate herein mentioned, of two feet and 5 inches, thereby making it exceedingly dangerous for persons entering said gate when one of the cars of said company was passing by and said dangerous place was known to the defendants, yet carelessly and negligently maintained the same, in that condition, which was unknown to this plaintiff.

IV. [5]

That on the 20th day of July, 1913, the defendant, Tacoma Railway & Power Company, had in its employ, one Paul Jackson, who, as motorman, was operating one of its cars, the number of which is unknown to this plaintiff, on the Point Defiance Line; and that on the said date, at about the hour of 8 o'clock P. M., the plaintiff, Margaret Cothary,

in company with two other friends, after having looked around the park, went across the tracks at the entrance of the park and walked down the tracks to the gate herein mentioned at the bath-house as is customary for all people who desire to get from the park to the bath-house. That when the said plaintiff, Margret Cothary, was upon the tracks herein mentioned, she noticed a street-car going into the park and she allowed said car to pass before crossing the out-bound track, and when said car had passed, the plaintiff looked to see if said car was followed by another and seeing no car, proceeded to the gate, and finding she could not enter said gate without turning the stile, was in the act of turning the said gate so that she could enter, when suddenly, without warning and not knowing that she was in a place of danger, while on the platform used for the use for persons to alight upon and maintained by said defendant company, the said defendant, through its carelessness and negligence in maintaining its track too close to the said gate, thereby producing a dangerous place in a public park and which was known by defendants, and unknown to this plaintiff; and through the carelessness and negligence of said Paul Jackson, motorman operating said car, in failing to stop said car as made and provided by the rules of said *said* company then in force and in failing to warn said plaintiff, although he knew or should have known, that plaintiff was in a place of danger, and through the carelessness and negligence [6] of said Paul Jackson, in operating his car at too high a rate of speed in a public park, namely, at

about 30 miles per hour which is contrary to the laws and ordinances of the city of Tacoma, namely, Ordinance #2252, as herein mentioned, which regulates the speed of street-cars on the streets and highways and parks where double tracks are used, and which speed is not to exceed 20 miles per hour, struck the plaintiff in the right side and back, thereby throwing her about a distance of 15 feet into a ditch, and thereby producing injuries herein complained of.

V.

That when the plaintiff was struck and thrown by said street-car through the negligence *and of* the defendant, she was rendered unconscious and remained so for some time; and said injuries produced, were a severe strain and tearing of the ligaments and muscles in the pelvic region of her back and hips; and straining and tearing of the muscles and ligaments in the abdominal region; also straining and wrenching of muscles of left leg and spraining the left knee, thereby making her a cripple for life. That the said plaintiff by reason of said injuries so received, has remained in the St. Joseph's Hospital for a period of about seven weeks and during all said time has not been able to get out of bed, only by assistance of nurses; and is at this time only able to walk around the house and then by assistance of crutches. That she has suffered intense pain and mental anguish and will continue to so suffer for a long time to come.

VI.

That at all times prior to the accident herein complained of, the plaintiff, Margaret Cothary, was a

strong, robust woman thirty-eight years of age; always able to perform her duties as a wife and mother and performed other duties as a [7] nurse, earning as such an average of $30.00 per month; and that by reason of the injuries so received, through the negligence of the defendants, she is unable to perform her duties as a wife and mother and further unable to work at her profession and will not be able to during the balance of her life time. That by reason of the injuries so received, plaintiffs have incurred hospital fees and doctor bills in the sum of One Hundred Eighty-one and 10/100 ($181.10) Dollars; and are damages in the sum of Fifteen Thousand ($15,000) Dollars.

WHEREFORE, plaintiffs pray judgment against the defendant in the sum of Fifteen Thousand ($15,000) Dollars, together with their costs and disbursements herein.

TEATS, TEATS & TEATS,
Attorneys for Plaintiffs.

(Verification.)
(Filed May 27, 1914.) [8]

Answer.

The defendant for answer to the complaint of the plaintiffs filed herein alleges:

I.

For answer to paragraph one of said complaint, this defendant admits the same and each and every allegation therein contained.

II.

For answer to paragraph two of said complaint,

this defendant admits that it was on the 20th day of July, 1913, operating a street-car line known as the Point Defiance line and that by Ordinance #2389 the defendant company was granted the privilege of running its said car line into said Point Defiance Park, and this defendant further admits that by Ordinance #2252, the speed of its cars was limited to twenty miles per hour where double tracks are used, but this defendant denies each and every other allegation in said paragraph contained.

III.

For answer to paragraph three of said complaint, this defendant admits that on the 20th day of July, 1913, and for some time prior thereto, it operated a double track street-car line into said Point Defiance Park, but this defendant denies each and every other allegation in said paragraph contained.

IV.

For answer to paragraph four of said complaint, this defendant admits that on the 20th day of July, 1913, one of its street-cars operated by Paul Jackson, as motorman collided with the plaintiff, Margaret Cothary, but this defendant denies [9] each and every other allegation in said paragraph contained.

V.

For answer to paragraph five of said complaint, this defendant admits that the plaintiff, Margaret Cothary, received certain slight injuries, but this defendant denies each and every other allegation in said paragraph contained.

VI.

For answer to paragraph six of said complaint,

this defendant denies each and every allegation in said paragraph contained and particularly denies that plaintiffs were damaged in the sum of $15,000 or in any other sum whatever.

FURTHER ANSWERING AND AS A FURTHER, SEPARATE AND FIRST AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

I.

That the accident hereinbefore admitted to have occurred, was occasioned by reason of the careless and negligent conduct of the plaintiff, Margaret Cothary, herself, and not otherwise, in that while defendant company's car was being operated in Point Defiance Park near the point known as Nereides Baths at a moderate and lawful rate of speed, plaintiff, Margaret Cothary, heedlessly, recklessly, carelessly, and unnecessarily, placed herself in a position of great danger, to wit, by placing herself and standing in such close proximity to the defendant company's street-car track and so near to the car being operated thereon, at a time when the motorman in charge of said car was unable to stop said car in order to prevent striking said plaintiff; that the said plaintiff, Margaret Cothary, failed to exercise her mental faculties in any way to observe, escape, and avoid the risks and dangers of her position which [10] were open and apparent to her and could have been easily avoided; that she failed to place herself sufficiently far from said car tracks to prevent being struck by the passing car, and failed to take any care or precaution whatever to provide for her personal safety.

WHEREFORE defendant prays that said action be dismissed and that it go hence with its costs and disbursements herein to be taxed.

J. A. SHACKLEFORD,
F. D. OAKLEY,
Attorneys for Defendant.

(Verification.)
(Filed June 16, 1914.) [11]

Reply.

Come now the plaintiffs and replying to the affirmative defenses set up in defendant's answer, state:

I.

In reply to paragraph I of the first affirmative defense of the defendant's answer, plaintiff denies each and every part thereof, which is inconsistent with the allegations of the plaintiffs' complaint.

TEATS, TEATS & TEATS,
Attorneys for Plaintiffs.

(Verification)
(Filed Jul. 2, 1914.) [12]

Verdict.

We, the jury empanelled in the above-entitled cause, find for the plaintiffs William Cothary and Margaret Cothary, husband and wife, and assess their damages at the sum of $2450—twenty-four hundred and fifty dollars ($2450).

J. B. SHELTON,
Foreman.

(Filed June 11, 1915.) [13]

Judgment.

This cause coming on regularly for hearing on the 8th day of June, 1915, before the Court and a jury, the plaintiffs appearing in person and by their attorneys, Teats, Teats & Teats, and the defendant appearing by its attorney, Frank Oakley, and the jury being duly impaneled, the cause proceeded with the introduction of testimony from day to day until the close of the 10th day of June, 1915, when the cause was substituted to the jury and the jury retired to consider its verdict; thereafter on the 11th day of June, 1915, the jury returned its verdict into court and found for the plaintiffs and assessed their damages in the sum of $2,450, and the verdict was thereupon duly filed in said cause, and now on this 12th day of June, 1914, on motion of the plaintiffs for judgment on said verdict.

IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the plaintiffs. William Cothary and Margaret Cothary, have and recover, and judgment is hereby entered against the defendant Tacoma Railway & Power Company, a corporation in the sum of $2,450, together with their costs and disbursements to be taxed according to law.

Dated this 14th day of June, 1915.

EDWARD E. CUSHMAN,
Judge.

(Filed June 14, 1915.) [14]

Petition for New Trial.

Comes now the defendant Tacoma Railway & Power Company, defendant in the above-entitled action, and petitions this Honorable Court for an order vacating and setting aside the verdict of the jury and the judgment made and entered in the above-entitled case on the 14th day of June, 1915, and granting a new trial for the following causes, materially affecting the substantial rights of the defendant:

I.

Excessive damages appearing to have been given under the influence of passion or prejudice.

II.

Insufficiency of the evidence to justify the verdict in that the evidence failed to show that the defendant's street-car was being operated in violation of any ordinance of the city of Tacoma, or of the laws of the State of Washington, or at a dangerous and excessive rate of speed. The evidence further shows that the plaintiff Margaret Cothary, stepped into a position of danger at a time when the motorman in charge of [15] defendant's car was unable to stop the car before striking her and that the plaintiff herself was guilty of contributory negligence.

III.

Error in law occurring at the trial as follows:

a. The Court erred in admitting the testimony of Oscar Helander, over the objection of defendant as follows:

"Q. Did you find out while you were there what was the matter with the turnstile that you could not go? A. No, sir, not until afterwards.

Q. Well, afterwards, what did you find afterwards?

Mr. OAKLEY.—I object to that question, unless he can tell when he found it, to see how near it is to the time.

Mr. TEATS.—Q. When was it?

A. Well, it was sometime after the accident.

Q. About how long after the accident?

A. I think it was about a week after the accident.

Mr. OAKLEY.—I object to that as being too remote.

The COURT.—Objection overruled; exception allowed. Only answer if you know from your own examination and observation, not from what somebody told you.

Mr. TEATS.—Q. What did you find?

A. I found one spoke of the turnstile was working almost against the other, or got down, or the whole turnstile had sunk down, rather, and that was the cause of the turnstile not going clear around." **[16]**

b. The Court erred in admitting the testimony of Mr. Shoemaker over the objection of defendant, as follows:

"Q. Now, the accident occurs and he places the emergency on at about the time of the accident, then runs 150 feet; what would you say as to the speed then?

A. Well, if he put on the reverse at the time of the accident?

Q. Yes.

Mr. OAKLEY.—Those are not the facts, and I object to that question as not being based upon the testimony.

The COURT.—The objection will be overruled. The jury will be the sole judges of what the evidence was, and if they have no recollection of any evidence to the effect of that embodied in the question, they will disregard the answer.

A. What is the question?

Q. Going down this incline, he strikes a woman, and at about the time of the accident he reverses his car and then runs a distance of 150 feet beyond, what speed would you say that he was going at the time of the accident?

A. Do you mean just pulling the reverse lever, egenerating it?

Q. He reversed his car—

Mr. OAKLEY.—I object to that question as not based upon the testimony and not the facts.

The COURT.—The objection will be overruled, and the jury given the same instruction. [17]

A. Before I answer I would like to know how he reversed his car. The reason I want to know is because there is two ways of reversing it.

Q. Well, it was first that he goosed the car, is not that what you call it?

A. Now, if he goosed the car he was not going very fast, if he went 150 feet.

Q. If he reversed and gave two or three notches, then what?

A. If he gave two or three notches and went 150

feet, I should judge he was going pretty fast.

Q. Could you judge at what rate?

A. I could not. I worked on that line the day this accident happened, but I do not remember what the facts were."

c. The Court erred in permitting the plaintiff to read the testimony of Paul Jackson, given at the former trial, for purposes of impeachment, without laying proper grounds for impeaching questions.

IV.

The Court erred in denying defendant's motion for a directed verdict.

J. A. SHACKLEFORD,
F. D. OAKLEY,
Attorneys for Defendant.

(Filed Jul. 23, 1915.) [18]

Order [Denying Petition for New Trial].

This cause coming on for hearing on the defendant's petition for new trial and the same being submitted, the Court finds the same should be overruled.

IT IS THEREFORE ORDERED that the said petition of defendant be and is hereby denied. Exception allowed defendant.

Dated this 2d day of August, 1915.

EDWARD E. CUSHMAN,
Judge.

(Filed Aug. 2d, 1915.) [19]

Order (Extending Time for Filing Proposed Bill of Exceptions).

Upon motion of defendant for an order granting said defendant a period of sixty days from date hereof in which to serve and file its proposed Bill of Exceptions herein,—

IT IS HEREBY ORDERED that said defendant be and it is hereby granted a period of sixty days from the first day of August, in which to serve and file its proposed Bill of Exceptions.

Done in open court this 2d day of August, 1915.

EDWARD E. CUSHMAN,
Judge.

(Filed Aug. 2, 1915.) [20]

Bill of Exceptions.

Transcript of Evidence and Proceedings.

BE IT REMEMBERED, that heretofore and upon, to wit, the 8th day of June, 1915, the above-entitled case came on regularly for hearing before the Honorable E. E. CUSHMAN, Judge of the above-entitled court, and a jury.

The plaintiffs being represented by their attorneys, and counsel, Teats, Teats & Teats; and,

The defendant herein being represented by its attorneys and counsel, John A. Shackleford and F. D. Oakley; and

Whereupon the following proceedings were had and testimony taken, to wit: [21]

Testimony of Margaret Cothary, Plaintiff, in Her Own Behalf.

MARGARET COTHARY, the plaintiff, being called and sworn in her own behalf, testified as follows:

Direct Examination.

(By Mr. TEATS.)

My name is Margaret Cothary. William Cothary is my husband. I live at Wilkeson, and have lived there for the last 35 years. On Sunday, July 20th, 1913, I was visiting my friends Mr. and Mrs. Helander who live on the right-hand side of 54th Street going into the Point Defiance Park which is the entrance of the park in the city of Tacoma. After dinner, about 5 P. M., Mr. and Mrs. Helander and myself walked into the park. We went down the old road that goes down the hill which is out in the center of the park, and after going through a portion of the park we took the boulevard to the rose arbor which is towards the bear pens. We started home, and Mr. Helander asked me if I was ever at the bath-house, and I told him I was not, and he told me it would be a nice time to go down there in the evening if I would care to go, and we went across the green and left that and went along the road along the fence a short distance. We stopped on the edge of the hill before we went down on the tracks. There was a car going into the park and we stopped until it passed, and then went down to the track and walked along the track towards the bath-house.

(Testimony of Margaret Cothary.)

Plaintiff's Exhibits "A," "B," "C," and "E," photographs showing the track and turnstile, were then introduced.

We went there to the gate. Mr. Helander was a little bit ahead of us and he walked in as far as the gate would open and **[22]** it caught, and he said he would try it the other way, and I thought we could go through either way, and I stepped back a little bit so I could get at it, and I took hold of one of the stiles and Mrs. Helander was next, and he had hold of the other one, and I had hold of one of those when the car hit me.

Exhibit "B" is a photograph of the turnstile showing myself and Mr. and Mrs. Helander at the stile.

Exhibit "C" shows the place where we came down on to the track and the arrow points to the path we came down.

Exhibit "D" is the hospital bill.

We were standing something near that (indicating on exhibit "B"); we were all pushing on those stiles sticking out, and I thought we were going to get around this way (indicating on the exhibit). I didn't notice you could only go one way. I was standing here (indicating on the exhibit) and we were all pushing on those stiles when the car hit me. I didn't know the car was coming at all until just when it hit me. I never heard it at all, but I heard two toots just like two whistles when it hit me. The two whistles were just at the same time. It seemed

(Testimony of Margaret Cothary.)

as though it was just at the same moment. I went into the ditch, I suppose. I don't know exactly what became of me. What I next realized was when Mr. Helander took me up a kind of a bank there and when he went to take me up the bank there, I realized then that he was taking me up the bank. They took me over to my friends, Mr. Helander's, and sent for a doctor. I stayed all night, and the next morning they took me to the hospital. I stayed in the hospital seven weeks. Was in bed all but two days. Dr. Brown attended me there. The car struck me on the right side, the right hip, my right shoulder and elbow, and on the inside of my left knee. I never **[23]** went to the bath-house. I have never been there yet. We passed some people on the tracks; I cannot say how many, as many as four, possibly six. They were going out of the park as we went in. When leaving the hospital I went home and laid around, part of the time I was up, and part of the time I was down. I walked with crutches. I used first two crutches and then one for a period of sixteen months. I was compelled to use crutches on account of the pain to my limb when I put my weight on my limb. My pain was mosty in the lower part of my back next to the hips. I had trouble in resting in bed, always had a pillow or a rubber ring or something under my back. Didn't rest very good during the first 16 months. Dr. Martin treated me at Wilkeson, Dr. E. M. Brown, in Tacoma. During the last two or three months I am quite a bit better than

(Testimony of Margaret Cothary.)

I was. There are some things I cannot do, and some things I can do all right. I cannot sweep or scrub or anything that is hard or anything that requires much bending. We have to hire that done. Before I was hurt I used to go out nursing whenever I was needed. I was out quite a lot. I worked by the case; I got $10.00 for each confinement case. I earned, I think, about $30.00 a month, sometimes I made more, and sometimes less. I cannot nurse now; it is too hard work. I haven't been able to earn anything since I have been hurt. I was never at the turnstile before the time of the accident. At the time of the accident I was there a very short time just as long as it takes to try to go in and then try to go the other way, just that long. We were going to the bath-house. **[24]**

Cross-examination.

(By Mr. OAKLEY.)

At the time of the accident and the present time I had a little sore on my face which had nothing to do with the accident. The jaw-bone was affected there from a tooth being pulled and broken off and it had been in that condition for five or six years. I was wearing a small plaster over it. The scar on my face is bigger now than it was at that time. The bandage was a little adhesive plaster, about one and a half or two inches in diameter. That was not hurt in this accident. While I was in the hospital Dr. E. M. Brown performed an operation on the 27th of August, just before I went home, and I

(Testimony of Margaret Cothary.)

was injured on July 20th. I don't know, but I suppose the operation was taking a piece of bone out. I went home the 7th of September. Dr. Brown had operated twice before that and he said that he could operate on it before I went home, because I was not doing anything, and he would give it time to get well. The previous operation was in February, I don't know whether it was in the same year or not. It had been in the same condition for five or six years. It would heal up, and at other times it would open.

In crossing the park from the animal pens we followed along that road, right along the fence after we got to it. I could not say whether there was an open road or gravel road running from the gate to that point at that time. We cut across the grass. We went up to the road by the fence, but I did not go any further to see where the road led. It was a sort of a wagon-road. I don't know whether the wagon-road is in the same condition now as then; I didn't see it yesterday. The track or path is overgrown by the brush since that time **[25]** as I saw it from the track yesterday. I do not know whether the path has been used much, but I suppose the bushes have grown bigger, that is all I can say. I do not know whether the path looks any different now or not. I didn't know as I would ever see the path again; I didn't make an examination of it at that time. The arrow points down to the man standing in the path who is my husband. And when we were going down that path, I saw a car going into the

(Testimony of Margaret Cothary.)

park. No car passed us while we were going down the path. I didn't know that when I stepped off of that path it was a dangerous place to go on to the track. I have been raised on railroad tracks where there are four or five railroad tracks. I certainly have been trained to pay some attention to the approach of trains. I think we walked down on the track nearest to the bath-house, but I couldn't say, on our way to the bath-house. I couldn't say whether the poles were between the tracks at that time. While we walked from the path, I think we all walked along side by side, and when we got to the platform Mr. Helander tried to open the gate, he was ahead. I was right behind him. He went a little further through. That is turning in to about there (indicating), and he went through as far as he could and I was right behind him. Mr. Helander was a little bit further through the turnstile, and I was where Mr. Helander was at one time when we were trying to get in. Mrs. Helander was behind me. I could not tell how close to the track I was, I was trying to get through there and trying to turn that around. I supposed it was a safe place to be and I supposed I could hear a car going, but I didn't. Yes, I was paying attention, I was going to go right through the gate. When we found the gate would not revolve that way we were all [26] trying to work it loose when I got hurt. We were going through first, one back of the other, and in the line we occupied in this position (indicating). We next tried

(Testimony of Margaret Cothary.)

to start to go out and I started to back up to give Mr. Helander room and Mrs. Helander got in there (indicating on exhibit "B"), and I got in this position (indicating on exhibit "B"), something like that. And very soon after I got in that position I was struck, I couldn't say how soon, but we were pushing towards the gate back and forth when it struck me. We were not there very long altogether. We didn't wait at all, we had no conversation over it only he said that he could go through the other way and so I stood back to help push. I was pushing on this (indicating). At the other trial in the state court I stated that I had a foot back a little further than is shown in that photograph. I had my left foot back just pushing, and it was a little further than is shown in the photograph as I could never get my foot so far since the accident and exhibit "B" fails to show my foot back as far as it was, and I couldn't say that when I had hold of the brace of this turnstile that I was standing with my arms back as far from it as shown in the photograph, but I know it was far enough that the car hit me. I was pushing pretty hard, as hard as I could. I don't remember of anything being said by Mrs. Helander at the time we were pushing, or anybody only that he said we would try it the other way. We started to try it the other way. The car struck my right hip, my whole side was all black, my left knee was cut open on the inside of the left knee. I don't know what part of the car hit me. That is me standing

(Testimony of Margaret Cothary.)

there in exhibit "B." I looked back to see whether a street-car was near or not or coming [27] as we stepped on the platform I turned around and looked up the track. I was there for just a short time; I was expecting to go right through the gate and did not look back again. I didn't know I could not get through the gate; I was trying to get through the other way. I did not see the bars sticking out like your fingers; Mrs. Helander was ahead of me and I didn't see the bars. The bars are shown in exhibit "E," but I didn't see them there that night. The turnstile only permitted one to go through on the right-hand side as I understood after the accident. I didn't pay any attention to the distance that my body was from the railroad track as I stood there, because I expected to go through the gate. I was there a very short time. We were not pushing very long when it occurred. The inside of my left knee was certainly struck by the street-car. There were a couple of cuts there. I didn't see the street-car or hear it until it struck me. I heard two toots just as it struck me. There was no car went down as we were going down the railroad track, only one when we were going down the bank. I suppose I could hear that car a long ways off, just a rattling and jolting of the car as it went along there. Sometimes you can hear them a great way off and sometimes you can hear them scarcely at all. It is not a paved track, but sometimes they make a squeaking noise and you can hear them a quarter of a mile away, and I heard

(Testimony of Margaret Cothary.)

nothing. I was expecting to go through the gate and didn't believe the car would strike me. As to the stopping of the car, it is according to how fast it is going. I have seen trains go so fast you could not get out of the road. I didn't attempt to ascertain whether or not a street-car was coming from the time I looked back; I didn't think a street-car could be there. We were just going right through. [28] It was daylight at the time of the accident. My hearing was in perfect condition at the time of this accident and still is. I had perfect eyesight and perfectly well except that sore on my face. I didn't see any signs up there which tell people who wanted to take a street-car at the bath-house to go around the loop. You cannot see that sign unless you are on the inside and we were not inside yet. I was not taking the path or using the turnstile for the purpose of taking a street-car, just going into the bath-house. Mr. and Mrs. Helander were not intending passengers. We were all going through simply to go through to the bath-house.

Redirect Examination.

(By Mr. TEATS.)

The spokes in the turnstile were pointed towards the track. They could be turned while we were there a little ways, just about like that (indicating), just as though the arms would catch or something. I thought they were catching on that bent wire screen about a half circle; I don't know anything about the arms on the other side; I thought it was

(Testimony of Margaret Cothary.)

the screen. The turnstile did not move sufficiently for us to get through. When I said "that far" I mean just simply as it came out to the end of the stile (indicating), and the ends of the stile would not pass by it and of course we could not get past the screen which was on the inside of the turnstile. It seemed to start by this post and just around towards the end of these spokes. I thought it was catching there where we was open there, but I didn't know. Mr. Helander went in a little way and found that he could not go any further, The spokes would turn **[29]** a couple of feet, I should say, that is the end of the spokes.

Recross-examination.

(By Mr. OAKLEY.)

When I stood there pushing we were pushing towards Mrs. Helander. We pushed it, but it seemed to be stuck again. It would not work that way nor either way, just a little back and forth. When the street-car struck me no part of my body was struck by the turnstile. I was all black on one side.

II.

[Testimony of Oscar Helander, for Plaintiff.]

OSCAR HELANDER, being called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I am a stationary engineer and I live at the corner of 54th and Pearl Streets. Pearl Street is the street in front of my house upon which the street-car runs

(Testimony of Oscar Helander.)

and ends at 54th. That is the entrance of Point Defiance Park. I have lived there 12 years. The people on the south end of the park, wanting to go to the bath-house, generally take the track and follow the track and go through the gate at the bath-house. The track runs north and south. North is towards the park and the bath-house is north from 54th Street, and the main park is to the west of the railroad track and the bath-house. There is a fence part of the ways on either side of the tracks, a little more than halfways up to 54th street on the east side of the track and about 350 feet south of the turnstile on the west side of the track. Everybody, motorcycles, bicycles and even women with baby buggies going to the bath-house, would generally **[30]** take the track and go through the gate or turnstile. The turnstile had been there a good many years. It is for the purpose of letting the people go through to the bath-house. I suppose at the south of the park is open for a long distance and there is a path or way to reach the track going across there down to the track. It is about the same as it is now, about six feet wide. It runs into the other road and follows a path. It goes up into the park. What I meant was it runs into the other path and then where we went there is about a few feet further back (indicating), that is a few feet north where we went down on the track. The turnstile is about seven feet high with arms on the four sides of it and posts on the north side and the arms join like this (illustrating), and on the south it was open

(Testimony of Oscar Helander.)

for people to go through and there was a latch at the top, but I don't believe that ever worked. That was a sort of a dog. The spindles were four feet from the track, that is from the end of the arm or spindle or spokes. The car extended over the rail towards the turnstile 18 inches. After dinner we decided to go down into the park. It was Sunday, on the 20th day of July, 1913, and we went on what is the best road now, and down to the waterfront, and then followed the waterfront to the rustic bridge; then we went up there again on the main road, and followed that up to the rose arbor, and she looked at some flowers around there, and then we proceeded and passed the greenhouse, and then she decided to go to the bath-house; she had never seen that; so we made up our minds to go. We went as far as the lake, and then we went across there on that path we were talking about down to the track, but while we were up there on that hill, we saw the car going out, or in (indicating), and that is all **[31]** we seen of the cars, and we went down on to the tracks, the inside track, and followed that to the platform, and as soon as we struck the platform, we went right to the gate. I was leading and when I came to the gate, it stuck. My wife came right behind, and she went on the other side of the gate and said, "Let us try it the other way," and then Mrs. Cothray got between us, in front of the turnstile; so we got it a quarter of the way around, that was all we could do. We could not get it in from there; it was impossible to get it open enough

(Testimony of Oscar Helander.)

to go through, and the moment we got together there the car came. I heard a whistle, and the same moment it struck her, and I should judge it took about a second for the car to pass, and there was a cloud of dust followed the car so I could not see where she landed, but as soon as I could, I went to her assistance, and then when I seen she was alive—she opened her eyes, and I really did not know how to handle her, she was all broke up. I asked her how she was, and she moaned a little. I got her up, and my wife was standing on the platform excited, and I called on her to help me with her up on that bank. We got her up on that bank, and then up on the platform, and set her down on that seat that used to be there, and after we got her up on that seat the car came back there and took her on to the car and around the loop up to my place, and the conductor called for a doctor, so a few minutes after we got her into the house, why the doctor came and attended to her. Mrs. Cothray landed about 16 feet on the lower side close up to the fence.

Here the witness makes a mark on exhibit "E" as about the place where she landed.

After we had reached the platform we didn't look to see [32] whether there was a car coming; we proceeded right ahead; some distance before we struck the platform we looked. I thought it was perfectly safe there, and went the first thing to the gate. We were not expecting to stop on the platform at all.

(Testimony of Oscar Helander.)

Exhibit "B" represents the situation at the time Mrs. Cothray was struck, showing myself with back towards the south.

There was a change in the platform from the time I last was there before the accident to the time Mrs. Cothray was hurt. They had moved the east track towards the platform I suppose 3 or 4 feet; I am not certain of that towards the turnstile. There were people along the track when we were there, they were going south, I don't recollect now, but I think there was six in the bunch. I didn't find out what was the matter with the turnstile when I was there, but afterwards.

Q. Well, afterwards, what did you find afterwards?

Mr. OAKLEY.—I object to that question, unless he can tell when he found it, to see how near it is to the time.

Mr. TEATS.—Q. When was it?

A. Well, it was sometime after the accident.

Q. About how long after the accident?

A. I think it was about a week after the accident.

Mr. OAKLEY.—I object to that as being too remote.

The COURT.—Objection overruled; exception allowed. Only answer if you know from your own examination and observation, not from what somebody told you.

Mr. TEATS.—Q. What did you find?

A. I found one spoke of the turnstile was work-

(Testimony of Oscar Helander.)

ing almost against the other, or got down, or the whole turnstile had sunk down, rather, and that was the cause of the turnstile not going clear around.

[33]

Cross-examination.

(By Mr. OAKLEY.)

Why, I didn't find out the day of the accident was because I never expected the track to be moved over and we had no time to make any investigations. We had pretty nearly got through when she got struck. I was out to see the platform yesterday. I noticed that it had been changed lately. The platform extends ten or 12 feet in fact towards the loop, down towards the main part of the part and towards the bath-house. At the time of the accident the turnstile was almost at the end of the platform, there was a place to stand there. I don't know for how many people, but there was plenty of room for one person. Exhibit "E" shows there is room enough for two persons to stand there, and from exhibit "B" it looks as if my wife had her feet at the very edge of the platform as she pushed there. When we were on the knoll we saw a car going by and when we went down on the path we went down on the track. That path on the track was about 6 feet inside, and the path through the Scotch Broom has room for about two to go abreast. We went one at a time. I didn't know that it is not a public street, that that street-car runs through on that path. I don't know whether it is or not, but it has been used for that

(Testimony of Oscar Helander.)

purpose. Wagons cannot very well go through there; they could, but there is no place to go to there. Motorcycles go down the tracks. People travel it. I call that a highway. Automobiles or wagons could go down it if it was necessary. I don't think it is a public street; it has been used for that purpose, and is to date. I have not seen wagons and automobiles use it. I didn't say that. I mean a public street and highway what people travels. I know it **[34]** is a private right of way of the street-car company. I didn't know the fence and Scotch Broom is put up there in an attempt to keep the people off. I don't know what they are put up there for. The people generally use that path that I spoke of in going to the bath-house from the park; some people go around the other way at the end of the loop. There is a path leading around the loop where people get on and off the cars. I didn't know at the time of the accident there was a sign telling people going from the bath-house to go this way (indicating) and take a street-car. I didn't know that until I went into court the first time. I heard of it there, and I went and seen it afterwards. The sign shows from the other side of the fence. That is, from the bath-house side of the fence, so that the people going out of the bath-house are told to go back to the loop to get a car. When we looked back before we got to the platform we looked up along the track. We were then about 50 feet away from the platform. From that time on we didn't look again and we went right

(Testimony of Oscar Helander.)

to the platform and when we got on the platform we were certain that were safe. The first thing we did when we got on the platform was to start for the gate to go through the gate. Mrs. Helander and Mrs. Cothary were following me. They were pretty close behind me. My wife went to the other side of turnstile. After my wife got around the turnstile Mrs. Cothary got in front of her. She walked around *that to* the car track and in front of the bars there. She had not been there more than a moment before the car struck her, just about the time she got there, the car struck her. She stood right in front of the turnstile. She didn't walk, she stood and pushed on those bars. She didn't keep that same position any more than a second I suppose, just [35] as she got there. When I first went to push through the turnstile they both stood back of me. I didn't look back to see exactly how they stood but as soon as I found out that we could not get through I told them that the turnstile was stuck and my wife walked to the other side and Mrs. Cothray went in front of the turnstile and just about the time she got there she was struck. Before we got to the turnstile I suppose the car was on the way down grade. I don't know how close Mrs. Cothary stood to the track before she got in front of the turnstile. I heard two toots of the whistle just about the time she was struck and it was just a short time before that she walked to that position. I don't know how far the car was away from us. The two toots seemed to indicate danger, and

(Testimony of Oscar Helander.)

Mrs. Cothary was struck at the same moment, and we never heard the street-car coming.

Redirect Examination.

(By Mr. TEATS.)

There was no other whistle blown except these two that I heard at that accident. I have had experience in railroading. I was fireman for ten years, and I can tell about the rate of speed a car is going when it passes me. That car was going over 30 to 35 miles per hour. I didn't notice where the car stopped after the accident. The sign on the inside of the turnstile was for the purpose of showing to the people to go to the loop to get a car, and the turnstile was there for the purpose of permitting the people to go through into the bath-house. There was no sign outside. I never saw any sign of that kind and the people went there at their will. There is a change there since the accident, the turnstile has been taken out so that the people can go both ways at their will. **[36]**

Recross-examination.

(By Mr. OAKLEY.)

The way I judged the speed of that car it took about a second for it to pass. I don't know exactly the length of the car but I think the car was about 44 or 46 feet. A car going about 44 feet in a second would be traveling about 30 miles per hour. Now, a street-car 50 feet long going 50 feet in a second is not going faster than I have seen them go. I have been on a locomotive traveling 35 miles per hour. I have

(Testimony of Oscar Helander.)

never figured out how long it would take to travel 50 feet. I figured on this car being 44 feet and I have seen this car since the accident. At the time of the accident I just seen it as it went by the platform. I don't know where it stopped. The car would hold all right going 30 to 35 miles an hour as it went into the curve. I have never tried it on a street-car line. I would know it was going fast if it struck the curve at that rate of speed. The curve like that on a locomotive running 30 to 35 miles per hour is some strain. I would not jump the track.

Redirect Examination.

(By Mr. TEATS.)

I think there is some up-grade after you reach the spur of the track.

II.

[Testimony of Anna Helander, for Plaintiff.]

ANNA HELANDER, being called and sworn as a witness on behalf of the plaintiff, testified as folows:

Direct Examination.

(By Mr. TEATS.)

I live on Pearl Street which is right there on the corner on the entrance of the park and have lived there 12 **[37]** years. I have noticed which way people go while entering the park when they want to go to the bath-house and they all go down the track. They all go down on the track to the bath-house. Everybody goes down to the bath-house, they all walk along the side of the track there, there is no other place to go. I have lived on the corner and I have never seen anybody go any other way. People

(Testimony of Anna Helander.)

going out, go the same way. I have never seen anybody horseback but I have seen motorcycles and baby-buggies go down there.

A. Well, we started from our place on Sunday afternoon, July 20th, and she came over to our place about one o'clock, and we had dinner, and after dinner we went down to the park. We went down the main road until we came down to the picnic ground, and we went from the picnic ground down to the water-front, down to the rustic bridge, and from there to the main road again, and from there to the rose arbor, and then we sat down for awhile there, and then on our way home, we were talking about the bath-house and she said she had never been there, and decided she would like to go to see it, and then we walked until we were up there by the lake, and so we crossed from there down to the—well, there is a little path goes through there and down to the street-car track, and so we went over there and down to the platform and when we came down to the platform, we went over and looked back to see, and I did not see any car in sight, so we crossed over and when we got up on the platform, the first thing we intended to go through, and could not; my husband was ahead and he says: "It is stuck here, we cannot get through," so I went to the other side and tried to jerk it loose. We thought we could jerk it loose, but could not, and so then the car came and struck her. [38] The first I knew the car came was when it struck Mrs. Cothray, I heard the whistle toot just as it struck her. There was no whistle

(Testimony of Anna Helander.)

blown before it struck her. I didn't hear any. I didn't hear any gong rung on the street-car. At the time the car struck Mrs. Cothary I was standing on the left-hand side, exhibit "B" shows me in the picture on the other side with a cap or hood on and when the car struck Mrs. Cothary I stood right in between these cars looking towards the bath-house, trying to get the turnstile loose. I didn't notice Mrs. Cothary at the same minute. We were all three trying to jerk the turnstile loose. We didn't try so very long, I cannot just remember how long it was, but I know that we didn't stay there very long. I noticed where the car stopped because I was wondering if the car was not coming back so I noticed how far the car went. It went to where they try to turn, I noticed it went that far up the curve close to the little cabin. I cannot tell exactly how far. I saw a lot of people that day before we went down on the track and when we went up we met some who were going out of the park from the bath-house.

Cross-examination.

(By Mr. OAKLEY.)

It was daylight when we got to the platform, and we looked for a car before we crossed the track, and I walked on the track so I could meet the car on the out-bound track. The others walked between the tracks, and from our position we could see a car coming towards us, one which might strike us. When we got to the platform my husband was ahead of us and started to push through the turnstile. Mrs.

(Testimony of Anna Helander.)

Cothary came right after him and I came after her. I think she was between us. We were right there together. At the time of [39] the accident we were not on the track, we were all on the platform. The turnstile did not work. He turned and said that we cannot get through, we are stuck. Let us see if we can try to jerk it loose so we did all three of us. I went around to the left-hand side. Mrs. Cothary was right in the middle. I didn't see her going to that position. She didn't need to move to take hold of the arms. Mrs. Cothary had to just step to the side of my husband just a few steps. We were all trying to get it loose. I couldn't tell you the time but we didn't stay there only long enough to try to get it loose. I couldn't see what caused the gate to catch. I didn't see or hear the car at any time until it struck Mrs. Cothary.

Testimony of William Cothray, One of the Plaintiffs [on Behalf of Plaintiff Margaret Cothray].

WILLIAM COTHARY being called and sworn as a witness on behalf of the plaintiff, Margaret Cothary, testified as follows:

Direct Examination.

(By Mr. TEATS.)

The platform was 44 feet long and six feet wide at the turnstile. I measured from the end of the spokes to the street-car and the distance was 2 feet 5 inches up to the car. It is approximately 95 feet to the first curve, [40] and it is 292 feet from the next curve to the turnstile.

Testimony of Lemuel C. Stine, for Plaintiff.

LEMUEL C. STINE, being called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I am police officer at Pt. Defiance Park, and have been there for six years, and go to work at 1 P. M. and work until 10:30 P. M. Exhibit "A" represents the railroad track leading down into the park. People going to the bath-house use the railroad track. The turnstile is maintained by the street railway company. There is a path running along the fence and a path running east and west across the railroad leading to the end of the fence where the path goes down to the railroad track. There is no restriction that I know of to the people using the tracks for any purpose. During July and August, more people visit the park than any other day. Four or five hundred during the day and evening visit the bath-house.

Cross-examination.

(By Mr. OAKLEY.)

The street-car company regulates the traffic at the turnstile to keep people from getting on the platform. There was a fence all along there, the street-car company repaired it at times, and the street-car company kept a dog on the turnstile to prevent it being used by people going out to the track, but I never saw it when you could not go through it either way. [41]

Testimony of Otto Ellison, for Plaintiff.

OTTO ELLISON being called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I live near the park, one block from the end of it, and for six years have noticed people who wanted to go to the bath-house using the track to get there Quite a few people go up and down the track on Sunday,—they used it the same as a public street.

Cross-examination.

(By Mr. OAKLEY.)

You could not keep them off the track unless you built a fence around it.

Testimony of Lillian Ellison, for Plaintiff.

LILLIAN ELLISON, being called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I live about a block and a half from the entrance of Pt. Defiance Park and have lived there for six years. People going to the bath-house from the south end of the park use the street-car tracks to get there. [42]

Testimony of Oscar Olson, for Plaintiff.

OSCAR OLSON, being first called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I have been animal keeper at the park for nine

years, working from 8 A. M. to 5 P. M. From the entrance of the park people walk down the railroad track to go to the bath-house.

Testimony of J. F. Murdock, for Plaintiff.

J. F. MURDOCK, being called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

During the summer of 1913, I lived at the entrance of the park, conducting a store. People wishing to go down to the bath-house invariably went down the railroad track.

Stipulation [as to City Ordinance No. 2389].

Mr. TEATS.—It is stipulated, if the Court please, that City Ordinance No. 2389 of the city of Tacoma, an ordinance granting to the Tacoma Railway & Power Company, its successors and assigns, the right to erect, maintain and operate an electric street railway line within the confines of Point Defiance Park in the city of Tacoma, Washington, and repealing Ordinance No. 1004, be introduced, and it is further stipulated that copies of the ordinance can be produced later on.

The COURT.—The jury will so understand.

Mr. TEATS.—The portions which I wish to read are as follows: |[43]

[Exhibit—Portions of City Ordinance No. 2389.]

"Section 1. That there be and is hereby granted to the Tacoma Railway & Power Company, its successors and assigns, the license, right and privilege to construct, operate and maintain a line of double

track electric street railway, together with the necessary poles and wires for electric purposes within Point Defiance Park subject to the rights of the Government of the United States in and to said premises, the rights and privileges herein granted to said Tacoma Railway & Power Company being as hereinafter set forth, and none other.

Section 2. That the said Tacoma Railway & Power Company, its successors and assigns, shall the license, right and privilege, subject to the rights of the United States, to construct, operate and maintain a double track electric street railway within the following boundaries:" Then follows the boundaries which are described here in this exhibit "A." "Provided that the operation of the road within the park shall always be subject to the general rules and regulations adopted by the Park Commissioners for the government of the park.

Section 3. At the terminus or loop of said railway and for a distance along the main line to be agreed upon by said railway company and the Board of Park Commissioners, the said railway company shall construct and maintain a wire fence six feet high with suitable gates tnd turnstiles for the protection of the public in getting on or off the cars."

[44]

Testimony of Etta Young, for Defendant.

ETTA YOUNG, being called and sworn as a witness on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live in the city of Tacoma. My husband is an

(Testimony of Etta Young.)

inspector employed by the defendant. I was a passenger at the time of the accident, and was taking a ride with the two Misses Liebels. I occupied the right side of the car going out, near the rear, but a little more than half way back. The car stopped at 54th Street and some people got on that I knew. As we were going around the curve I looked out of the open window and saw three persons at the turnstile, and a lady with red on her head was a little distance from the other two, who seemed to be closer together. The lady who was injured had a white bandage on her head. I did not see Mrs. Cothary struck. They were standing at the turnstile. The car whistled when it went into the park, and it whistled afterwards, but I cannot state just when. The car came to a standstill about two lengths from the platform. I did not know whether the car had got to the platform or not, when I felt the brakes applied. The car then backed to the platform and the plaintiff got on. I heard the plaintiff say that she did not hear the car coming, and stepped in front of it.

Cross-examination.

(By Mr. TEATS.)

I do not know how far it was to the platform from the place where I saw the people at the turnstile. It was in the first curve. I was looking out of the right-hand [45] window. The lady with the white bandage was not standing as close to the other track as they were together, but she was closer to the car.

Testimony of Ellanora Liebel, for Defendant.

ELLANORA LIEBEL, being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I was a passenger on the car at the time of the accident, together with my sister and Mrs. Young. I was seated directly back of Mrs. Young. The car stopped at 54th Street and some passengers got on. The car stopped very suddenly about two lengths beyond the turnstile, then backed up. I heard the whistle blow at the entrance of the park. The plaintiff was taken on the car and her head was tied up with something white. I heard her say that she did not see the car coming,—that she must have stepped in front of it.

Cross-examination.

(By Mr. TEATS.)

I first heard the brakes go on and the car stopped with the rear end about two blocks beyond the turnstile. The plaintiff when taken on the car seemed to have a bandage around her head. I heard the plaintiff say that she did not see the car. [46]

Testimony of Paul Jackson, for Defendant.

PAUL JACKSON being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I was motorman, in charge of the car at the time

(Testimony of Paul Jackson.)

of the accident, and have been a motorman since December, 1912. My regular run was on the Pt. Defiance line. I was operating car No. 143 between 45 and 50 feet long. I stopped at 54th Street for some passengers to get on,—got two bells from the conductor and started into the park about half speed, until I got to the first curve. Then I threw it off. Then as I was going out of the first curve I noticed some people standing on the platform at the bathhouse. They did not look to be in any danger from where I was. The car went down with a slight application of air to steady the brakes, but when I got within a car-length or two of the platform I noticed one lady was in danger, but when I saw she was in danger I threw the air over into the emergency and did not have enough air to have much effect on the brakes and when I saw it would not stop it in time I released the air and reversed the car. I blew the whistle two or three times as I was going into the first curve, and blew it again about a car-length from the time I hit plaintiff. The brakes were in good condition and there was no means at my command by which I could have stopped the car sooner than I did. I think the gate struck the woman.

The car went about two lengths beyond the platform and stopped, I then backed the car to the platform. [47]

Cross-examination.

(By Mr. TEATS.)

I had been on this run as a regular run for four or

(Testimony of Paul Jackson.)

five weeks before the accident. During that time the park was visited by large crowds of people. They used the tracks in going from the bath-house out and in whenever the stile is out of order so they can push it either way. There are some people on the track nearly every trip when I go through there but not always on the platform, sometimes people were on the platform. I didn't know the turnstile was out of repair that day. I never knew that the turnstile was out of repair so it could not be worked. When I came down the line and reached 54th street I stopped. It is a regular stop, then got a bell to go on which is necessary in order to go ahead. It is down hill to the platform, but the grade is not quite so steep as when we start at 54th street as it is just before we reach the platform. We start the car with the juice and then when the car gets headway, throw off the juice and let it roll down. It will roll on down clear to the park without any further juice and that is the way I did on this day. I threw off the juice as I was going out of the first curve, that is the curve just inside of the park from 54th street.

Here exhibit "E" is marked with figure 1 in circle. Then the curve goes on down to the point which is marked on the exhibit figure 2 in the circle with red lead pencil. When you get out of the curve that is at figure 2 then strike a tangent, I couldn't say as to the distance between the two, but it is several hundred feet to the point marked figure 3 in the circle, which is another little curve; it is about the same

(Testimony of Paul Jackson.)

as the others was, and as you reach the second curve the [48] grade is a little bit steeper, and then you reach the end of the curve at figure 4 marked in red lead pencil in the circle. Then it is a tangent down to the platform. The grade then commences about a car length or two from the other side of the platform, which would be about the switch. At the point marked with a caret in red lead pencil, then there is an up-grade into the loop. I first saw the people on the platform as I was coming out of the first curve. To the best of my recollection the man and one lady was standing in close to the stile and other lady was standing out closer to the track when I first saw them. It looked like they were standing there in conversation at the stile, right opposite the stile, to the best of my recollection from the time I first seen them until the car struck her. I don't remember that they were standing there as seen in exhibit "B." They may have moved but I never noticed them. It is my duty to look ahead and see where there is any danger on the track or people near the track, that is part of my duty as a motorman, and when I came out of the first curve I looked down to see if my way was clear and I let my car roll on down hill. And then when I came out of the second curve I saw that Mrs. Cothary was in danger. I blew the whistle, I cannot say just what kind of a whistle I gave; I remember blowing it. I then put on the emergency brakes and then ran down

(Testimony of Paul Jackson.)

past the stile, struck her and then ran two cars lengths beyond.

Q. So that when you stopped, you had traveled from the point of collision three car lengths of that car before you stopped?

A. No, sir, I won't say it was that far.

Q. Didn't you say so in your testimony before?

A. I don't remember of it. [49]

Q. The length of that car is about forty-five or fifty feet? A. Yes, sir.

A. And the distance that your car stopped, the rear of your car was then about one hundred feet beyond the point of collision, wasn't that the fact?

A. That would make the rear end two car lengths from the time I hit her.

Q. That would make the rear end two car lengths, or about one hundred feet beyond the point of collision, isn't that a fact?

A. No, sir. I wouldn't say that the car was one hundred feet from the time that I hit her.

Q. And the point of your car was three lengths from the point of collision, isn't that a fact?

A. No, I would not say that either.

Q. Or about one hundred and fifty feet?

A. No, sir.

Q. And didn't you so testify in the trial before?

A. I do not remember saying the rear end of the car was two car lengths from the place where I hit her.

Q. (Reading.) "Q. You were the length of two

(Testimony of Paul Jackson.)

cars past this turnstile before your car stopped?

A. Yes, sir.

Q. That is ,the rear of your car was two car lengths away from the turnstile? A. About that." Didn't you answer that way?

A. I do not remember of it.

Q. Don't you remember that was your testimony before?

A. That may have been my testimony, but I don't remember all the statements which I made.

Q. Isn't that the testimony that you gave here before on the trial of this case?

A. It may have been; I do not remember. **[50]**

Q. "Q. That would be three times forty-five or one hundred and thirty-five feet after you passed the turnstile before you stopped your car?

A. From where I was? Q. Yes. A. It would be around that some place." Isn't that what you testified to?

A. I could not say as to that. Of course, if it is down on paper, it may have been.

Q. Don't you remember now that is the way you testified before?

A. I could not say that it is.

Q. Don't you remember now that is about the facts of the case as far as you remember?

A. I remember something about two car lengths, but I don't remember whether it was the rear end or not.

Q. Now, you said that you were about one car

(Testimony of Paul Jackson.)

length, or orty-five or fifty feet away from Mrs. Cothray when you gave the whistle and attempted to stop the car. Is that right?

A. Well, I won't say—well, it was there where I was giving it over into the emergency.

Q. I understand your answer in answer to a question I put to you when you came out of this second curve that you saw Mrs. Cothary was in danger?

A. Just when I got on to the straight track.

Q. And that is about 100 feet from the platform, is it not? A. I could not say as to that.

Q. And about 145 feet from Mrs. Cothary as she stood at the turnstile, is it not?

A. I could not say as to that, either.

Q. Now, at that time, did you apply the brakes?

A. I applied the brakes as soon as I saw she was in danger and would be struck if she did not move.

Q. You saw that she was in this position (illustrating) out [51] towards the platform?

A. She was standing with her back to the tracks, yes, sir.

Q. And Mr. Helander was in front of her to the right? A. Yes, sir.

Q. And Mrs. Helander was in front of her to the left? A. Yes, sir.

Q. And she was in close proximity to the track there?

A. Yes, she was closer to the track than either of the other two.

Q. And so close that you could see that you were

(Testimony of Paul Jackson.)

liable to hit her if she did not get out of the road?

A. Yes, sir.

Q. And you saw that as you came around and out of this second curve?

A. I saw that as I was coming down on that straight track.

Q. About how far away from her were you when you saw her condition?

A. A car length or a car length and a half.

Q. Wasn't it two car lengths?

A. I could not say as to that.

Q. Would you not say now that it might have been two car lengths?

A. No, sir, I would not say that.

Q. You would not say it was less than two car lengths, would you?

A. I would say it might have been a car length or a car length and a half.

Q. You would not say it was about two car lengths?

A. No, sir, I do not know as I would.

Q. Or about 90 feet or 100 feet away?—What is your answer to that?

A. I would not say whether—I do not know about that. [52]

Q. Was it at that moment that you gave the whistle or before that or after that?

A. As soon as I saw she was in danger, that she would be struck by the car if she did not get out of the way.

Q. At that moment you gave her the whistle?

(Testimony of Paul Jackson.)

A. I gave her the warning, yes, sir.

Q. That was at the time that you came out of the second curve on to the straight track?

A. Yes, sir.

Q. That was the time you immediately began to put on the air? You had the air, did you not?

A. I did not have as much as I should have.

Q. That is, you were putting on the air as you came down, as I understand you?

A. Why, I had a slight application on the brakes, that is all.

Q. Now, didn't you testify in answer to questions put to you on cross-examination at the previous trial, that you blew the whistle hard about 100 feet away from Mrs. Cothary?

A. I could not say as to that.

Q. (Reading:) "Q. Then when you got within about 100 feet of them, you gave the air whistle, a shrill whistle? A. Yes, sir." Didn't you testify that way?

A. I gave the whistle when I first seen her there.

Q. What do you mean by giving the whistle when you first seen her there?

A. When I came down that straight track out of the second curve, when I saw she was in danger.

Q. How far away?

A. I could not say as to the distance.

Q. You knew when you were testifying before?

A. Not exactly.

Q. Do you know any more about it now than you did then? [53]

(Testimony of Paul Jackson.)

A. No, sir, I could not say that I do.

Q. When did you give her another whistle?

A. I do not think I gave her another whistle then.

Q. That was the last whistle that you gave?

A. I think so.

Q. Didn't you give two blasts of the whistle just before you struck her?

A. No, sir, I do not remember; it might have been.

Q. Was it a long or short whistle?

A. I could not say as to that, either.

Q. You stated that you were going at the rate of about twelve or fifteen miles per hour. Where were you going about twelve or fifteen miles per hour?

A. That was down about the platform.

Q. Down by the platform?

A. Just about at the platform, yes, sir.

Q. How fast were you going when you were going from the second curve?

A. About the same rate.

Q. How fast were you going when you came out of the second curve?

A. That would be all, about the same rate down through there.

Q. About twelve or fifteen miles per hour when you gave that blast and saw the people in danger? At that time you were going twelve or fifteen miles per hour; is that right? A. Just about that.

Q. Your air was working? A. Yes, sir.

Q. And how fast were you going when you struck Mrs. Cothary?

A. I was probably going a little slower.

(Testimony of Paul Jackson.)

Q. How much slower? [54]

A. I could not say as to that.

Q. About how much was your speed then?

A. I could not say as to that, either.

Q. Could you give us an estimate?

A. No, sir, I could not say that I could.

Q. You knew how fast you were going down hill here (indicating)?

A. Well, it would not have been quite as fast as it would have been there in the curve, any way.

Q. Then with your air on you had slowed up some?

A. That was the cause of slowing up.

Q. Did you slow up? A. A little bit.

Q. How much? A. I could not say how much.

Q. Were the other brake appliances all right?

A. The hand brake?

Q. All the appliances you used to stop a car?

A. Everything was in pretty good order.

Q. As I understand you, you saw the immediate danger, gave the whistle, and then you saw the air was not going to stop the car, and then you reached for your controller and reversed the current, is that true? A. After I released the air.

Q. How did you release the air?

A. Threw it over so as the air will run out of the brakes.

Q. That is done in an instant. You have your hand on your lever going down through there?

A. Generally have.

Q. And you did at that time? A. Yes.

(Testimony of Paul Jackson.)

Q. All you have to do is to shift it over there?

A. Yes, sir.

Q. Then you can reach from your lever and reverse it; all done [55] with a twist of the wrist?

A. Yes, sir, but it is not good to reverse it with the air on.

Q. But you reversed it? A. Yes, sir.

Q. When you reversed it after putting on the current, isn't there a force that stops the car, too, called goosing it?

A. That is for down grade or something like that.

Q. When you are on a down grade and want to stop it quick, you goose it?

A. Yes, but you would not stop as quick as reversing it.

Q. Did it stop suddenly? A. Yes, sir.

Q. You can stop a car going twelve or fifteen miles an hour by simply goosing it in a car length?

A. I have never seen it done.

Q. You have tried it? A. I have.

Q. How long does it take you to stop a car by goosing it?

A. When you goose a car, you reverse it, but you don't give it the juice.

Q. It generates electricity, and that stops the wheels?

A. Stops them for a second, and then it runs on again.

Q. That is why when we are riding on a car it will give a jerk and then run on, and jerk again; that is goosing it? A. Yes, sir.

(Testimony of Paul Jackson.)

Q. That will stop that car going down a good track in a car length, at the furthest a car length and a half? A. I have never seen it done.

Q. Did you do it in this instance? A. No, sir.

Q. Could you stop it quicker by reversing it?

A. Yes, sir.

Q. Then when you reverse with a reverse lever you throw on **[56]** the current and that sets the wheels going backwards? A. Yes, sir.

Q. And that is all done with your left hand?

A. Yes, sir.

Q. And it is done in a fraction of a second?

A. I don't say you can do it in that time.

Q. Now, when you are going twelve or fifteen miles per hour, by reversing, you can stop your car in a car length or a car length and a half, when you know you have somebody in front of you whom you are liable to hurt?

A. Sometimes you can and sometimes you cannot.

Q. Why?

A. Some cars it takes longer to generate backwards, and get the wheels in motion.

Q. But it does not take long on those cars, especially 143, to go backwards, making twelve or fifteen miles per hour?

A. That depends on how your air is.

Q. I mean with the air off.

A. I cannot say as to that.

Q. Now, as a matter of fact, Mr. Jackson, what you call an ordinary stop at crossings,—what do you

(Testimony of Paul Jackson.)

call that? A. A passenger stop?

Q. No, sir, a service stop, going twelve or fifteen miles per hour, you can make a service stop with the air within a car length?

A. That is providing you have your air tank full of air to start with.

Q. What do you mean by having your air tank full of air to start with?

A. We have an automatic pump, and that sometimes gets low. [57]

Q. That is pumped up to about 70 pounds per square inch? A. Seventy or eighty pounds.

Q. When it goes down to 55 pounds, the pump starts automatically? A. Yes, sir.

Q. So you can never get below 55 pounds without the pump replacing it?

A. Yes, unless the pump is out of order.

Q. Why didn't you have air enough to stop the car that day?

A. The air was going out through the whistle.

Q. How many times did you blow the whistle?

A. I could not say how many times, but I blowed it so much I didn't have much air.

Q. You didn't blow it between the first and second curve? A. I do not remember.

Q. If it was below 70 pounds, the pump would pump it up? A. I could not say.

Q. So when you struck that curve you must have had fully 70 pounds, excepting one or two short blasts of the whistle?

(Testimony of Paul Jackson.)

A. If I remember, I gave more than one blast of the whistle to start with, the first whistle I gave.

Q. Where was that?

A. If I remember right, about the first curve.

Q. Did you whistle any more until you got into the second curve?

A. I believe I blew three or four times, what we call a "railroad whistle," two long and two short whistles.

Q. When did you arrive at that fact that you blew a railroad whistle?

A. Generally always do blow a railroad whistle going down [58] there.

Q. What was the occasion for that?

A. Well, I do not know; it is my own idea, I guess.

Q. You didn't testify to that before?

A. I do not know how I testified to that before.

Q. You know you did not testify anything about a railroad whistle before?

A. I said I gave a whistle, I do not know as I said what kind I gave.

Q. For the ordinary whistles going down there—then,—even if you gave a railroad whistle, it would not use up the air from 70 to 55 pounds?

A. That depends on how long you blow your whistle.

Q. You blew a whistle all the way down? It would require you to blow your whistle all the way down to release that air?

A. When you are blowing the air out of the whistle,

(Testimony of Paul Jackson.)
it does not take long to reduce the air in the tanks.

Q. So your position is that because you did not have air enough in the tank when you reached the tangent before the platform, your reason is that you wanted to reverse and did not get the air, and could not stop before, by using the air?

A. I could not stop quick enough by the air.

Q. That was because you did not have enough air?

A. Not enough to stop before I struck.

Q. And the reason for that was because you were blowing the whistle all the way down?

A. Not all the way down.

Q. How far down?

A. I blew between the first curve, I do not know whether I blew between the first curve and the second, but I blew it [59] again at the second curve.

Q. When you put the emergency brake on a car, it is felt by the passengers sometimes, is it not?

A. Yes, sir.

Q. Isn't it generally felt when you put on emergency brakes?

A. If you have a good deal of air to start with, to jam the brakes on to lock the wheels.

Q. If you reserve it, that is emergency also?

A. That is another kind of an emergency.

Q. And after you reverse it, it would produce some effect on the passengers in stopping?

A. They can feel it.

Q. It feels as if you hit something?

A. Yes, sir.

(Testimony of Paul Jackson.)

Q. What kind of a track was that that day?

A. A dry track.

Q. So that on a dry track you can stop your car quicker than on a slippery track?

A. Unless it has been raining pretty hard, and then it is about the same as a dry track.

Q. But a dry track is preferred for quick stopping.

A. Yes, sir.

Q. And reversing on a dry track is all right, that will stop a car quickly? A. Yes, sir.

Redirect Examination.

(By Mr. OAKLEY.)

It was against the rules of the company to stop and take on passengers at the platform and turnstile. On Sundays the car stopped when coming out only to let passengers off of the car. I didn't get a signal from the conductor to stop at the platform. [60]

Testimony of Amelia Liebel, for Defendant.

AMELIA LIEBEL, being called and sworn as a witness on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I was a passenger on the car at the time of the accident in company with Mrs. Young and my sister. We were seated right back of Mrs. Young and the car stopped at the entrance of the park, several passengers got on, four of whom we were acquainted with. The car came to a standstill and I walked to the back of the car and saw that a lady had been struck. They picked her up and took her to a seat at

(Testimony of Amelia Liebel.)

the turnstile, then when the car backed up they helped her on; at the entrance of the park I heard the whistle. When the brakes were applied the car gave a hard jerk. The plaintiff had a white bandage on her head.

Cross-examination.

(By Mr. TEATS.)

I do not remember hearing any more whistles after the car left the entrance of the park. The first thing I knew was the sudden stopping of the car and the sudden jolt. I did not notice that the car was going fast.

Testimony of John Blauw, for Defendant.

JOHN BLAUW, being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I was a passenger on the car at the time of the accident, seated in the front of the car. I first heard a kind of a lull, a dull bump, and the next thing some fellow [61] stuck his head out of the window and cried somebody hurt,—the car came to a stop, then a shudder went thru the car, kind of, and then the car came to a stop and I went back to the turnstile. The rear end of the car stopped about 60 feet past the turnstile. Mrs. Cothary was not on the platform yet. The car was traveling at a usual speed down toward the bath-house. Before we could come to the turnstile I noticed a whistle. There was an alarm. It was just about when the lady was hit. I could hear

(Testimon of John Blauw.)

it. I was sitting right in front. I do not remember feeling the brakes applied.

Cross-examination.

(By Mr. Teats.)

The fact of the matter is I don't remember very much about anything up there. Two years ago when you never think of the subject afterwards you don't remember details. I don't remember I didn't hear any statement made by Mrs. Cothary after she was placed on the car. I was sitting close by but I didn't pay any attention to that, I was glad that she was not killed or was not worse. The first I heard of the accident was when I heard a dull bump and wondered what the dull bump was; I heard it plainly and knew that we must have struck something, and then "Oh! Oh!" I didn't feel the shudder of the car like the brakes being put on. The emergency was not put on 50 or 60 feet back. I noticed the bump and that a young fellow with his head through a window said, "Oh! Oh!" Hit her hard enough to make her bump so that you could hear it on the other side of the car. It was a dull bump. I don't think it was the brakes. It was an unusual occurrence. I never experienced a car weighing 57,000 pounds strike a little person [62] like Mrs. Cothary and make a dull bump like that in my life. I was sitting talking with my wife and was not paying much attention to anything; I presume to my wife more than anything else. I don't know when

(Testimon of John Blauw.)

the car passed the turnstile. I don't remember if that bump was when it passed the turnstile or not. I testified in this case before.

Q. You were asked these questions by Mr. Oakley: "Q. Did you get off the car? A. Yes." You testified to that, didn't you? A. Yes, sir.

Q. "Q. How far had the car gone beyond the turnstile?

A. Well, possibly 300 feet." Did you answer that that way. A. No, sir.

Q. "Q. Did you notice that switch there?

A. Yes."

A. Did I answer that I noticed the switch there?

Q. Yes.

A. I forgot all about that.

Q. "Q. Did you notice the switch there?

A. Yes." Did you notice that switch there? Have you ever been out there?

A. I do not remember anything about that now.

Q. Did you ever notice that that switch is upwards of 100 feet away from the turnstile?

A. I don't know. Pardon me, since you have asked me that question, may I ask you a question? You must remember distance is something that I never practice, but after the 60 feet I wrote down, that is why I stick now to the 60 feet.

Q. "Q. How far was it from the cabin? A. Well, quite a distance from the cabin." Did you answer that way? A. Yes, sir.

Q. "Q. From where the car stopped?

(Testimon of John Blauw.)

A. Yes, sir, that is quite a distance." You answered that way.

"Q. Do you know how far it is from the bath-house to the turnstile, how many feet? [63]

A. No, sir. I could not tell you in feet.

Q. Was it half way from the cabin to the turnstile, do you think, where the car stopped.

A. I know the cabin, but just the distance from the cabin I could not say.

Q. Was it closer to the cabin or to the turnstile when you got off?

A. Well, I should say possibly about the middle, possibly so."

Did you answer those questions that way?

A. I think so. That was a year and a half after the accident.

Q. And this is about two years?

A. And still I remember; yes, sir.

Q. Have you got the statement that you made to the company in your pocket?

A. Yes, I got it an hour ago. I wanted to know exactly what I told, because I wanted to tell the truth.

Q. Yes, and you said in this statement, "How far did the car go before it stopped," And you said "Sixty feet."

A. Yes, because I wrote that four days after the accident, because my memory is pretty sure there.

Q. And you say you do not know anything about distance? A. I testified as well as I could.

Q. You are testifying now from a memorandum

(Testimon of John Blauw.)

and not from your recollection. When you testified under oath and said that it was half way between the cabin and the turnstile, what about that?

A. Well, it came to me,—I know exactly what 60 feet is, but when you suddenly asked me a question a year and a half afterwards, a man is likely to make a slip, which I surely did. You kind of caught me napping, without thinking. That is all. [64]

Testimony of L. E. Albert, for Defendant.

L. E. ALBERT, being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am employed by the defendant as a carpenter and constructed the gates at the bath-house. The gates were first placed at the further end of the loop, at the right is a stationary post with spindles sticking out. One passing between the others to prevent people from coming out and to prevent them from turning it in the opposite direction. There is a rachet drops into a notch which keeps them from going in thru the gate. Anyone leaving the car can pass thru but they cannot pass out.

On August 1st, 1913, I inspected the gate and found that it was in perfect condition. I found the rachet raised with a spike driven in it, to hold it up so that the gate could be turned either way. I took the spike out and also put in some new spindles into the gate proper. One of them was broken. On the morning of the second of August from the time I left there the

(Testimony of L. E. Albert.)

evening before that rachet was put up again with a stick under it. There was a board stuck up down toward the bath-house which said "This way to the park,"—the finger on the board was pointed north, from the platform along a road on the inside [65] of the fence next to the bath-house.

Testimony of J. C. Alkire, for Defendant.

J. C. ALKIRE, being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(ByMr. OAKLEY.)

I have been employed as a motorman and in the construction department of the defendant company. I have operated car #143 and in my judgment the car would run 15 miles per hour from 54th Street stop to the bath-house. I made the repairs on the platform and removed the turnstile April 14th, 1915. The platform was lengthened about ten or twelve feet, but was not changed in width. The turnstile was at the north end of the platform.

Redirect Examination.

(By Mr. TEATS.)

In my judgment the car #143 could not reach any more than 15 miles per hour down hill after starting on power at 54th Street. Plaintiff's Exhibit "G" is a photograph showing the conditions of the platform.

Redirect examination.

(By Mr. OAKLEY.)

The car could not go down around the curve at 35

or 45 miles per hour; you could not keep the trolley on. [66]

Testimony of Ben Swanson, for Defendant.

BEN SWANSON, being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I have been a motorman for 28 years, and worked in the city of Tacoma for 24½ years. I have operated car No. 143 on the Pt. Defiance line, and I think the highest speed that car could attain from 54th Street to the bath-house is about 15 miles per hour,—faster speed is prevented by the switches and frogs, the curve and the trolley would not stay on the line. The car coming 15 miles an hour could be stopped not less than 165 or 170 feet. The best way to stop is with the air brake. In making an emergency stop if the wheels begin to slip he would have to release the air and pull the reverse lever and feed up the electricity thru the controller gradually to get the wheels in reverse motion. Going 35 miles per hour the car could be stopped in 350 feet. Going 20 miles per hour, probably in 260 feet.

Cross-examination.

(By Mr. TEATS.)

I said at the last trial that the car #143 was geared up to 20 or 25 miles per hour.

Testimony of James Clark, for Defendant.

JAMES CLARK, being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I have been a motorman nearly 26 years. Have [67] operated on Point Defiance line between 12 and 14 years, and have operated car #143; on the level track the car would make 25 miles per hour with the juice on. Going down to the bath-house with full power on it would go from 25 to 30 miles per hour, but just beyond the bath-house is a switch point and a frog, and it is not safe to run there at a high speed, and as a rule the trolley would be thrown off going around the curve. In running 15 miles per hour the car could probably be stopped in 130 to 150 feet,—it depends altogether upon conditions. You cannot make a surprise stop as easily as a service stop. In going 20 miles per hour the car could be stopped between 230 and 250 feet.

Cross-examination.

(By Mr. TEATS.)

In a long distance the car would go down hill faster without current than with current. There is not grade enough going into the park, of course, to increase the speed much, if you threw the power off. The grade is about 1½%. If you started to stop the car going at 15 miles per hour before reaching an object and put on the emergency he would have probably reduced his speed to 7 or 8 miles per hour, and

(Testimony of James Clark.)

could stop the car in possibly 30 or 40 feet.

Redirect Examination.

(By Mr. OAKLEY.)

Car #143 is 50 feet long and weighs 56,900 pounds.

[68]

Testimony of James N. Young, for Defendant.

JAMES N. YOUNG, being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am employed by the defendant as an instructor for street-car conductors and motormen, and have been motorman for a number of years. Car #143 has two 450 horse-power motors, geared to make between 20 and 25 miles per hour on the level. If car #143 were fed up to the entrance of Pt. Defiance park and let run with a heavy load you could probably make 25 miles per hour.

The car going at the turnstile at the rate of 15 miles per hour, an emergency stop could be made inside of 100 feet to 135 feet. Going 20 miles per hour, it could be stopped in from 150 to 160 feet. The motorman and conductor had orders not to take up passengers at the bath-house on Sundays.

Cross-examination.

(By Mr. TEATS.)

If you have a long down grade and the brakes not set too tight, the car will go as fast as the wheels

wll roll. You cannot stop a car under emergency conditions as you can under ordinary conditions. [69]

Testimony of John A. Jackson, for Defendant.

JOHN A. JACKSON, being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am assistant claim agent for the defendant company, and about 1 P. M. the day following the accident, I took the exhibits introduced herein, Plaintiff's Exhibits "G," "F," and Defendant's Exhibit "I." I also took measurements at that time. From the outer edge at the rail of the easterly edge of the platform was 50 inches, and the distance between the outer edge of the rail and the outer edge of the steps of the car #143, was 29½ inches, right opposite the turnstile, between the step and the end of the arm of the turnstile was 20 inches. The width of the platform was 72 inches,—six 12-inch planks.

Testimony of Mrs. Helander, for Plaintiff.

MRS. HELANDER, being called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. TEATS.)

At the time of the accident Mrs. Cothary did not say that she must have stepped in front of the car. She did not have a hat on. She had a little piece of sticking-plaster on her face. Nothing around her head. [70]

Testimony of Margaret Cothray, the Plaintiff [on Her Own Behalf].

MARGARET COTHARY, one of the plaintiffs, being called and sworn as a witness on her own behalf, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I did not have a bandage on my head, and did not make the statement that I stepped in front of the car.

Testimony of M. W. Miller, for Plaintiff.

M. W. MILLER, being called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I worked seven months as motorman for the defendant. Five months as conductor, and have run car #143 on the Pt. Defiance line. If a car had stopped at 54th Street and the current then put on, when it past thru the first curve the current is turned off and the car coasts down at the turnstile, it would be going 15 miles to 20 miles per hour, and could be stopped at from 75 to 100 feet. Going at the rate of 15 miles per hour with the emergency put on, it could be stopped from 60 to 70 feet. Going at 8 miles an hour, it could be stopped inside of 20 feet. A short whistle at the entrance of the park, then a long whistle, at the first curve, then a railroad whistle, and a couple of blasts 100 feet from the turnstile, would not reduce the air pressure, if the air pump was work-

(Testimony of M. W. Miller.)

ing. With the juice on the car could attain a speed of 25 miles an hour at the platform. [71]

Cross-examination.

(By Mr. OAKLEY.)

I could not run Car #143 faster than 25 miles per hour with all the current on, and this was not on a level track. If the car was going down to the turnstile at 15 miles an hour and a person suddenly appeared in what the motorman discovered to be a dangerous position, and the motorman threw the air on as fast as he could, then threw it off, and threw the current off and reversed the car, it could be stopped in about 125 feet to 150 feet.

Redirect Examination.

(By Mr. TEATS.)

If a motorman was going toward the turnstile on car #143 and when about 100 feet from the platform noticed a person in danger, he applied an emergency, then run a distance of 300 feet beyond the point of collision, I do not see how a car could possibly do it which had been reversed. If he ran 150 feet beyond that point of collision it would either indicate a slick track or else the reverse was not working, and the car was going at least 20 miles per hour.

Testimony of D. B. Mann, for Plaintiff.

D. B. MANN, being called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I have worked as a motorman for the defendant

(Testimony of D. B. Mann.)

company for about one year, and have run car #143. The maximum speed down into the park which the car could attain would be 22 miles per hour. **[72]** With the power off on a grade, it would run faster. If the car was going 15 miles per hour at about 100 feet from the platform and the motorman wanted to make an emergency stop the car could be stopped in a length and a half, if he did not slide. A car will slide easily with the wheels locked. You can stop quicker in a service stop,—say in a car length. If a car with the emergency on went 150 feet past the point of collision, the car would be going 35 miles per hour. The blowing of whistles going into the park would not make much reduction in the air if the pump was working properly.

Cross-examination.

(By Mr. OAKLEY.)

A car can never be stopped twice in the same distance with an emergency stop. It is the hardest stop. A car is more liable to slide. If a woman appeared suddenly in a position of danger on the platform, the distance he stopped the car would be according to how scared he was and how quickly he acted. If he stopped within 150 feet I would say that he hit the party before he applied the brakes. If you stopped a car going 22 miles an hour in its length, it would almost buckle the car into and throw the pasengers *threw* the front of the car. I was discharged by the defendant company for reckless driving. Had four accidents in three months. **[73]**

Testimony of George S. Shumake, for Plaintiff.

GEORGE S. SHUMAKE, being called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I worked for the defendant company as motorman for about 1½ years, and am familiar with car #143. Car #143 going into Pt. Defiance Park at the first curve with the juice thrown off, brakes adjusted to regulate speed down to 15 miles an hour,—if at that time the motorman about 100 feet from the platform saw a party in imminent danger of being struck by the car, threw the air and reversed his car, I should judge he could stop it in 100 feet. If the car was throwing dust as it past, the turnstile, this might be due to the air he had released. I would consider stopping a car within 100 feet at the bathhouse would be a good service stop.

Cross-examination.

(By Mr. OAKLEY.)

An emergency stop is harder to make than a service stop. At the time of the accident if the motorman saw a woman at the turnstile in danger, his car was going 15 miles an hour and he reversed the car, in my judgment it would take at least 150 feet to stop the car. **[74]**

Redirect Examination.

(By Mr. TEATS.)

If he saw a woman 1000 feet away, she is standing

(Testimony of George S. Shumake.)

there by the arm, he is going down and he is keeping the car under control by the lever and when he gets within 100 feet of her realizes that she does not know he is coming, the car could be stopped within 100 feet. I was discharged by the defendant company.

[Proceedings had as to Testimony of Witness Jackson.]

Mr. TEATS.—I would like to have the reporter read some questions and answers in the testimony of the witness Jackson.

Mr. OAKLEY.—I object to any such procedure as that I could call for the reading of the testimony of some of their witnesses.

The COURT.—Is it for your benefit or for the benefit of the jury? **[75]**

Mr. TEATS.—This is testimony from the former trial, an impeaching question, if the Court please.

The COURT.—You want to have his prior testimony read on some questions asked him in the former trial?

Mr. TEATS.—On those questions, yes, sir.

(Recess to 1:30 P. M.)

Mr. TEATS.—From the evidence of Mr. Jackson at this time, I believe he stated that he did not know what he did testify to on the last trial, that if it was on paper, it was all right. Now, I think we should produce that particular part of the evidence.

The COURT.—I will have to ascertain just what question you asked him and what was in his former

testimony to see whether it was fair to him or not.

Mr. OAKLEY.—As I understand it, the only way you can put on that testimony is where he denied having made it, and there is no denial.

The COURT.—Well, counsel would have the right to make him admit that he did testify formerly so-and-so, if it was at all at variance, or claimed to be at variance with what he testifies now. If he simply says that he did not remember it it, is substantially a denial, and on the other side, does not get the benefit of his admission, if he made an admission.

Mr. OAKLEY.—He was talking about the testimony, and he says if it was on the paper he must have said it.

The COURT.—But that leaves the jury in doubt as to whether he was right or whether the other side was right.

Mr. TEATS.—That puts it up to us to show what was on the paper.

The COURT.—I want to know what the questions were, to see whether the admission that you expect to read is what you gave **[76]** him a chance to answer about.

Mr. TEATS.—Then we will have the stenographer go on the stand with his notes of the trial of last September as to the witness, Mr. Jackson, upon the points indicated. Mr. Reporter, please turn to that note.

Mr. OAKLEY.—Do you mean the old testimony? I have no objection to the typewritten transcript being used.

Mr. TEATS.—Will you stipulate that these ques-

tions and answers were given in the other trial?

Mr. OAKLEY.—Certainly. I will say that the paper you have is the testimony, but I want to save an exception to Mr. Teats introducing these questions and answers.

The COURT.—Before the questions and answers are read, I want to know the question, what you asked Mr. Jackson yesterday.

Whereupon the reporter read as follows:

"Q. So that when you stopped, you had traveled from the point of collision three car lengths of that car before you stopped?

A. No, sir; I won't say it was that far.

Q. Didn't you say so in your testimony before?

A. I don't remember of it.

Q. The length of that car ib about forty-five or fifty feet? A. Yes, sir.

Q. And the distance that your car stopped, the rear of your car was then about one hundred feet beyond the point of collision, wasn't that the fact?

A. That would make the rear end two car-lengths from the time I hit her.

Q. That would make the rear end two car-lengths, or about one hundred feet beyond the point of collision, isn't that [77] a fact?

A. No, sir, I wouldn't say that the car was one hundred feet from the time that I hit her.

Q. And the point of your car was three car-lengths from the point of collision, isn't that a fact?

A. No, I would not say that either.

Q. Or about one hundred and fifty feet?

A. No, sir.

Q. And didn't you so testify in the trial before?

A. I do not remember saying the rear end of the car was two car-lengths from the place where I hit her.

Q. (Reading:) 'Q. You were the length of two cars past this turnstile before your car stopped? A. Yes, sir. Q. That is, the rear of your car was two car-lengths away from the turnstile? A. About that.' Didn't you answer that way?

A. I do not remember of it.

Q. Don't you remember that was your testimony before?

A. That may have been my testimony, but I don't remember all the statements which I made.

Q. Isn't that the testimony that you gave here before on the trial of this case?

A. It may have been; I do not remember.

Q. 'Q. That would be three times forty-five or one hundred and thirty-five feet after you passed the turnstile before you stopped your car? A. From where I was? Q. Yes. A. It would be around that some place.' Isn't that what you testified to?

A. I could not say as to that. Of course, if it is down on paper, it may have been." [78]

Mr. OAKLEY.—Upon those questions I am reserving an objection on the ground that there is no ground laid for an impeaching question.

The COURT.—The objection will be overruled. Exception allowed. I rule this way on account of the fact that the witness was not clear, and was will-

ing to admit if it was written out he probably said so, but I believe any impeaching testimony should only go to what you said you read to him. I do not believe if you ask him if he said in substance so-and-so, you can now read what he did say, but where you read his exact words, and then he said he did not remember, I believe you can read from his former testimony what you embodied in your question.

Mr. TEATS.—That is what I am attempting to do at this time, in speaking of the distance that he stopped after passing the turnstile.

WHEREUPON Mr. Teats over the objection of the defendant on the ground that no ground was laid for impeachment questions, Mr. Teats read to the jury the questions and answers read to the Court by the reporter as shown on the three preceding pages.

Thereupon plaintiff rested. [79]

Motion for Directed Verdict.

Whereupon Mr. Oakley on behalf of the defendant, made the following motion:

The defendant at this time moves the court to direct the jury to return a verdict for the defendant for the following reasons:

I.

That the complaint does not state grounds sufficient to constitute a cause of action.

II.

That the evidence fails to show that the car was exceeding any speed limit, or operated in a careless or negligent manner, which would afford grounds for recovery on the part of the plaintiff.

III.

That the plaintiff Margaret Cothary herself was guilty of contributory negligence, and that she was a contributing cause to the accident,

Whereupon the Court denied the motion and allowed defendant exceptions.

Whereupon, after argument of the case to the jury by the respective counsel, the Court charged the jury as to the law of the case to which charge no exceptions were taken by either party. **[80]**

Instructions.

The COURT.—Gentlemen of the jury, it is the duty of the Court to advise you concerning the law applicable to the evidence in this case. Counsel in their argument have very fully explained the law of the case to you, and as far as the Court has been able to discern, very fairly so. You will take out with you the pleadings in this case, and they will disclose to you exactly what plaintiffs complain of, and exactly what answer the defendant makes to the allegations of the plaintiffs.

In the course of my instructions I may refer to the plaintiff, and what she did at various times. You will understand that there are two plaintiffs, husband and wife. Under the law where a married woman is injured, it is necessary that her husband join with her in bringing the suit, but the question of what she should have done and what the street-car company should have done, is all treated and disposed of in the case—(interrupted).

Mr. TEATS.—Pardon me, but I filed some re-

quested instructions on the other trial. Are they being considered as filed in this trial?

The COURT.—I had not examined them.

Mr. TEATS.—They were filed before, and I did not know whether,— [81] (interrupted).

The COURT.—I will do the best I can to cover your request. Gentlemen of the jury,—so, the Court, in giving you these instructions may drop into a habit of speaking of the plaintiff, and you will understand at all times that this refers to Mrs. Cothary who was injured, and the Court does not mean to leave the other plaintiff out altogether, but it is only natural that she is the main feature in the issues here, and I may drop into that in giving you these instructions.

The complaint of plaintiff alleges the operation of this street-car in the park, and that on this day in question, July, 1913, that the plaintiff, Mrs. Cothary, while near the street-car track, was struck and injured by one of defendant's street-cars. It alleges that the defendant was negligent in that the street-car was too close to this turnstile, and also that the car was running at too great a rate of speed, and that the motorman did not give any signal or warning to the plaintiff of the approach of the car, and that he was negligent in not stopping the car quickly enough.

Defendant in its answer denies all of this negligence alleged against it by the plaintiff, and alleges that the plaintiff herself was negligent, and that that negligence on her part was the proximate cause of her injury. The plaintiffs deny that the plaintiff,

Mrs. Cothary, was negligent.

These are the issues you are called upon to try.

This is what is called a negligence case. It is [82] the duty of the Court to define to you what negligence is and make it as plain to you as I possibly can. Negligence under the law is what is defined as want of ordinary care, and ordinary care is defined as being the care which an ordinarily careful and prudent person would exercise under like circumstances, and should be proportioned to the peril and danger reasonably to be apprehended from want of proper prudence. It is the rule you should apply in determining whether the defendant was negligent, and it is the rule you should apply in determining whether Mrs. Cothary was negligent, that is, did the motorman exercise ordinary care, or did he exercise less than ordinary care, and you are to determine whether the plaintiff, Mrs. Cothary used ordinary care, or whether she herself exercised less than ordinary care at all times, considering all of the circumstances surrounding the motorman in the one instance and the plaintiff in the other.

The Court instructs you that the question about this turnstile being too close to the track, or its not working, that you will disregard that as an allegation of negligence on the part of the defendant company, but you will not disregard the situation where the turnstile was, and that it refused to work, and the situation in which the plaintiff was placed as being one of the circumstances and a part of the situation as bearing upon whether in view of that situation the motorman in the operation of his car

exercised ordinary care. If this motorman, or any motorman, who, operating a car, knew that ahead of him at such a considerable distance was a grown person, apparently in possession of all of her faculties, who, at the rate of speed the [83] car was being run, had ample opportunity to get out of the way, would have a right to assume that a person would get out of the way, unless there was something in the surroundings and circumstances which would lead an ordinarily careful and prudent person to believe he might be hurt, and it would devolve upon the motorman to take some further precautions to avoid injury.

If a person is negligent, and by their own negligence they are the proximate cause of another's injury then they are responsible and liable for that injury, except as I will otherwise instruct you in this case. Now, to enable a person to recover on account of the negligence of another, that person must not himself have contributed in any way to the happening of the accident by his own negligence or want of ordinary care. The plaintiff in this case, while she was crossing this street-car track, or in close proximity to it, was herself bound to exercise the care that an ordinarily careful and prudent person would exercise in the use of their eyes and ears and faculties, in protecting herself from injury, and if she did not exercise that care, then she cannot recover, even though the defendant was negligent in the operation of its car, as claimed in the complaint. The law does not undertake, if both parties are to blame, in the manner in which it is alleged here, and one is injured,

that is if they are both negligent and one is injured, the law does not undertake to divide the blame. Where both are negligent and one is injured, the injured person has to suffer for the injury, providing [84] the negligence of the injured person was one of the proximate causes of the injury.

As to this expression I have used in these instructions concerning the proximate cause, all I can say to you in defining proximate cause is to say that it is the moving, efficient cause, that cause, which, moving in direct sequence, uninterrupted by any other efficient cause, produces a result. The law says every person is responsible for all the consequences which flow naturally and directly from his voluntary act, but that he is not responsible for consequences which do not flow either naturally or directly from his acts.

I stated what was necessary for plaintiff to prove by a fair preponderance of the evidence. The fair preponderance of the evidence is defined as the greater weight of the evidence; that evidence preponderates which is of such a nature as to create and induce belief in your mind, and where there is a dispute, some of the evidence one way and some of the evidence the other way, that evidence preponderates which is sufficient to overcome the evidence brought against it and still induce and create belief in your minds as to its truth. Now, in this case, as in every other case where a person comes into court, as the plaintiff has done in this case, and alleges negligence on the part of another as a cause of action, before they can recover they must establish by the fair preponderance of the evidence the particular

negligence which they allege, and in this case if you find that the weight of the evidence is with the defendant, [85] either on the ground of negligence, or whether that negligence was the proximate cause of plaintiff's injury, even if you find that the evidence on either of those points is evenly balanced and you are unable to say whether it preponderates in favor of the plaintiff or in favor of the defendant, it would be your duty to find against the plaintiff and for the defendant. That instruction is applicable so far as the allegation of the complaint is concerned that it was the defendant's negligence which caused the injury.

Now, the defendant, having charged that the plaintiff was negligent, the burden of establishing that contributory negligence on her part rests on the defense, unless plaintiff's testimony has shown that she was not.

These questions, that is, whether the defendant was negligent or whether the plaintiff was negligent, are questions of fact that you are to determine in view of all of the circumstances of the situation and surroundings as detailed in the evidence before you, tested by your judgment as practical men.

As I have tried to point out to you the fact that plaintiff cannot recover if she was negligent, although defendant was negligent, I will put it to you in another way; that is, when you go out to your jury room, logically the first thing you will consider is whether the plaintiff had been guilty of contributory negligence. If you find from the preponderance of

the evidence that she was, it would be your duty to stop there and return a verdict for the defendant without going into any other issues of the case. If you find that there was no preponderance of the [86] evidence to show that she had contributed to her own injury by her own negligence, you would then pass on and consider the second question; that is whether the plaintiff by the fair preponderance of the evidence has established that the defendant was negligent in any one of these three particulars which I have submitted to you, that is, the excessive rate of speed of the car, the negligence in not sounding a signal or warning the plaintiff, or negligence in failing to stop the car in time to avoid injury. If you find there was no preponderance of the evidence to show that the defendant was negligent in either of those particulars, then you will stop and return a verdict for the defendant, but if you find that there was a preponderance of the evidence showing that the defendant was negligent in any of these three particulars, then you will go on to the next step and fix the amount which plaintiffs are entitled to recover in this case. If you come to that question in the case, taking into account what the evidence has shown, if anything, regarding the impaired earning capacity of plaintiff, taking into account what the evidence may show regarding her pain and suffering, you will allow plaintiffs such an amount as in the exercise of your best discretion you deem would fairly compensate her for the injuries which she has suffered. I do not mean in giving you this instruc-

tion to omit the amount of bills incurred for doctors and hospital services. You will take that into account also. Do not allow anything for future pain and suffering unless you find from the evidence that [87] it is reasonably certain she is permanently injured or that she will hereafter endue pain or suffering on account of this injury.

There is an allegation in the complaint that there was an ordinance forbidding the running of cars in the park in excess of twenty miles per hour. You will disregard that allegation, as I understand there is no contention now that the mere fact that there would be no right under any circumstances for the street-car company to run its cars in excess of twenty miles per hour in the park.

You will understand I have told you negligence is want of ordinary care, and when you are determining what an ordinarily careful and prudent person would do, you will take into account the circumstances, situation, and surroundings at the time. Now, so far as this allegation of excessive speed is concerned, that rule applies to that as well as the giving of any signal or effort made to stop the car. I told you in a previous instruction that care should be proportioned to the peril and danger reasonably to be apprehended from want of ordinary prudence. You will take into consideration what the evidence may have shown regarding the use that was made by pedestrians of this turnstile or the path along the track. You will take into account ordinary degree of care; by that I do not mean to lead you away from

what I told you about ordinary care. Bear in mind that at all times this motorman was required to exercise ordinary care, and to determine what the exercise of ordinary care would be under the circumstances you will take into account what an [88] ordinary careful and prudent person would have done with that car in view of the extent of use shown by the evidence of the turnstile and platform and the path where this accident happened by the public in the park.

I will read to you certain instructions. They probably will to some extent repeat what I have already told you, but in so far as they do, you will not draw the inference that the Court is trying to unduly impress upon you those particular points of the case to the exclusion of others where I do not repeat the instructions. I am reading these in an attempt to cover the entire case, to leave nothing upon which I have not instructed you.

"I instruct you that the law assumes nothing in favor of the plaintiffs or of their allegations in their complaint, and the burden of proof is upon them at all times to establish affirmatively by the fair preponderance of the evidence their allegations of negligence against the defendant company. The fact that an accident may have occurred, and that the plaintiff, Margaret Cothary may have sustained injury while standing on the platform near the gate in Point Defiance Park, near what is known as the Nereides Baths, raises no presumption of negligence against the defendant company."

"You are instructed that before the plaintiffs can recover they must show by the fair preponderance of the evidence that the injury which the plaintiff, Margaret Cothary, complains she suffered, was the direct and proximate result of the negligence of the defendant's employees, [89] as set forth in the complaint, and if the evidence of negligence in this respect is evenly balanced for the plaintiffs and against the plaintiffs, your verdict must be for the defendant, because the plaintiffs have failed in their proof."

"I instruct you that the defendant charges in its affirmative defense that this accident was the result of the careless, negligent conduct of the plaintiff, Margaret Cothary, herself, in that while defendant's car was being operated in Point Defiance Park near the point known as the Nereides Baths, at a lawful rate of speed, the plaintiff heedlessly, carelessly, recklessly, and unnecessarily placed herself in a position of great danger by standing in such close proximity to defendant's street-car track and so near to the car being operated thereon at a time when the motorman in charge of such car was unable to stop said car in order to prevent striking her; that said plaintiff, Margaret Cothary, failed to exercise her mental faculties in any way to observe, escape and avoid the risks and dangers of her position near said tracks, which were open and apparent to her and could have been easily avoided; that she failed to place herself sufficiently far from said track to prevent being struck by a passing car, and failed to take

any care or precaution whatever to provide for her personal safety."

"I instruct you that if you find from the evidence in this case that the plaintiff, Margaret Cothary, failing to exercise ordinary care, heedlessly and carelessly placed herself in an unsafe and dangerous position on **[90]** the platform in controversy, in such close proximity to defendant's railroad track that she was struck by defendant's car, while said car was being operated in a safe and careful manner, and was injured thereby, this would constitute contributory negligence on her part, and your verdict must be for the defendant."

"If you find from the evidence that both the plaintiff, Margaret Cothary, and the employees of the defendant company were negligent and that this accident resulted from the joint or concurring negligence of the parties, that is, the negligence of both plaintiff and defendant concurrently contributing to the injury, then your verdict must be for the defendant. The law does not undertake to deal with relative degrees of negligence, and even though defendant's employees were guilty of negligence, if you also find that the plaintiff, Margaret Cothary's negligence contributed to the injury, then your verdict must be for the defendant, regardless of the ratio or proportion of negligence of the respective parties."

"Where the plaintiff so far contributes to the accident by his or her own negligence, or want of ordinary care and caution, that but for such negligence or want of ordinary care and caution on his or her part the accident would not have occurred, the plain-

tiff cannot recover, and your verdict must be for the defendant."

"You are instructed that the plaintiff, Margaret Cothary, was not a passenger or an intending passenger of the defendant company, and the company owed her no duty to keep or maintain the platform in question for her use or [91] the use of any other travelers upon said platform, other than passengers or intending passengers of the defendant company. In using said platform, plaintiff could not lawfully complain of the manner in which said platform was built or maintained, or the manner and condition in which the turnstile thereon was built or maintained, but was bound to make use of the platform and turnstile in the manner in which they were constructed, and assumed all risks and dangers incident to the use thereof. But this would not relieve the defendant of the duty to exercise ordinary care in the operation of its cars, and plaintiff would not, by attempting to use the turnstile, assume any risk arising from any negligent operation of its cars by the defendant, if it was so negligent."

"If you find from the evidence that the plaintiff, Margaret Cothary, was negligent in failing to look and listen or otherwise use her faculties before placing herself in dangerous proximity to defendant's tracks, and if she had looked or listened or otherwise used her faculties, she could have thereby seen or heard the car in time to avoid the accident, and to have discovered her dangerous position near the defendant's tracks, then she was guilty of con-

tributory negligence, and your verdict must be for the defendant."

"The Court instructs the jury that the employees of the defendant company owed to the plaintiff, Margaret Cothary, only that degree of care which an ordinarily careful and prudent person engaged in the same business would have exercised under like and similar circumstances, **[92]** and if the jury find that the employees of the company exercised such care, then the jury will find their verdict in favor of the defendant."

"You are instructed that the plaintiff, Margaret Cothary, in this case, was not a passenger of the defendant company, and the defendant company owed her the duty merely of exercising ordinary care to prevent injury to her."

"You are instructed that a motorman operating a street-car has a right to assume that a person apparently in full possession of his health and faculties, standing near a street-car track, will not carelessly and unnecessarily place himself in a position of danger, unless there is something in the situation to indicate otherwise to a man of ordinary care. In the absence of evidence to the contrary, he has a right to presume that the person is in the exercise of his faculties and that he will stop or turn aside before he steps into a position of danger."

"I instruct you that the failure of the motorman in charge of a car to blow a whistle or ring a bell, if you find that there was such a failure in this case, or if you find that the car was traveling at an excessive rate of speed, if you find that this was the

case, you would not relieve the plaintiff, Margaret Cothary, from the necessity of taking proper precaution for her own personal safety. Negligence on the part of the company's employees in these particulars is no excuse for negligence on the part of the plaintiff. If you find that she was negligent in failing to look or listen or otherwise exercise her faculties to **[93]** avoid the accident, and placed herself so near defendant's street-car track as to be struck by a car being operated thereon, then the accident was the result of her own mistake and error in judgment, and the defendant cannot be held liable."

"If you find for the plaintiffs in this case, you will confine your verdict to such an amount as will compensate them for actual loss and damage in the case. You will not allow them anything by way of punishment or exemplary damages. There should be no idea of punishing the defendant in your minds, but simply that of compensating the plaintiffs for their loss, if, as I said before, you should find from the evidence in this case that they are entitled to recover anything."

"The burden is upon the plaintiffs to show by the fair preponderance of the evidence that the injury which the plaintiff, Margaret Cothary, complains of, resulted from the accident. You are not justified in awarding them for purely speculative injuries, that is to say, for the results which may or may not happen, and you will not allow the plaintiffs anything for future pain and suffering unless you are satisfied by the fair preponderance of the evidence that

future pain and suffering are reasonably certain to result from the injuries."

"You are instructed that the defendant was not required by law, or by ordinance of the city of Tacoma to limit the speed of its street-cars within the boundaries of Point Defiance Park to any particular rate of speed. It was required only to run its cars under the existing circumstances, and if you find from the evidence that [94] defendant's street-car was operated at a rate of speed equal to twenty miles per hour, or even thirty miles per hour, this in itself would not constitute negligence on the part of the defendant."

One of your number spoke to me during the day that he thought a number of you would desire to go and take another look at this place where the accident happened. Now, I will ask you if you go out, I do not care to send you out there unless a majority of you, at least seven of you, want to go. After you return to your jury-room, take a ballot on whether a majority want to go and take another view of the premises, and send word to the Court. I will ask counsel to wait until we determine the method of the view to be taken.

The Court submits to you two forms of verdict, one form finding for the plaintiff, which has a blank left in it for you to insert the amount at which you will determine the plaintiff is entitled to recover; the other one simply finds for the defendant. When you have arrived at your verdict, you will cause whichever one of these is to be completed, signed by your foreman and return into Court.

There is one instruction which the Court gives in every case. If you are here very long, you will become used to it, but I have not given it yet in this case. It is that which both counsel have in effect stated to you in their arguments will further instruct you that you are the sole and exclusive judges of every question of fact in the case and the weight of the evidence and the credibility of the [95] witnesses. In weighing the evidence and passing upon the credibility of the witnesses, the law says you should take into account the appearance of the witnesses as they come before you, not only their appearance, but their manner and demeanor and the way in which they gave their testimony, whether they impressed you as fair-minded, trying to tell you all they knew, not taking from it or adding to it, or whether they impressed you as being reluctant, evasive, trying to keep back something, or whether on the other hand they impressed you as being too willing, and free volunteering information about which nothing had been asked. You will take into account the situation in which each witness was placed as enabling that witness to know exactly what was going on and to be able to detail it to you accurately afterwards, as one witness might be in a much better position to tell you just what took place than another one equally positive. You will take into account the testimony of each witness by itself, whether it appears to be complete, whether it is corroborated where you would expect it to be corroborated if it was true, or whether contradicted by other evidence in the case. You will take into account the interest

which any witness may have in the case, either in their manner of giving their testimony or other relation to the case. Both plaintiffs having taken the stand in their own behalf, you will apply to their testimony the same rule as you do to the testimony of other witnesses, including their natural interest in the result [96] of the case.

THE COURT.—Any exceptions, gentlemen?

(No exceptions.) [97]

Verdict.

Thereafter the jury returned into open court with a verdict in favor of the plaintiffs for damages against the defendant in the sum of $2,450.

Now in the furtherance of justice and that right may be done, the defendant presents the foregoing as its Bill of Exceptions in this cause, and prays that the same may be settled, allowed, signed, and certified by the judge, as provided by law, and filed as a Bill of Exceptions.

J. A. SHACKLEFORD,
F. D. OAKLEY,
Attorneys for Defendant.

(Filed Sept. 28, 1915.)

(Refiled Dec. 28, 1915, after signing of order settling.) [98]

Order Settling Bill of Exceptions.

Now, on this 28th day of December, 1915, the above cause coming on for hearing on the application of the defendant to settle the Bill of Exceptions in said

cause, defendant appearing by F. D. Oakley and John A. Shackleford, its attorneys, and the plaintiffs appearing by Teats, Teats, and Teats, their attorneys, and it appearing to the Court that the defendant's proposed Bill of Exceptions was duly served on the attorneys for the plaintiffs, within the time provided by law, and that certain amendments have been suggested thereto and that counsel for the plaintiffs and counsel for the defendant have agreed as to the said amendments which should be made, and it appearing to the *clerk* that there has been filed with the clerk of said court a bill of exceptions which contains the amendments agreed upon by the parties, and that the same is in all other respects a duplicate of the proposed Bill of Exceptions filed by the defendant herein in this cause, and it appearing that the time for settling said Bill of Exceptions has not expired; and it further appearing to the Court that the said Bill of Exceptions as amended by agreement contained all the material facts occurring in the trial of said cause, together with the exceptions thereto and all the material things and matters occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said Bill of Exceptions and the clerk of this court is hereby ordered and instructed to attach the same thereto;

THEREFORE, upon motion of John A. Shackleford and F. D. Oakley, attorneys for the defendant, it is hereby

ORDERED, that said Bill of Exceptions as amended, filed on the 28th day of September, 1915,

be and the same is hereby [99] settled as a true Bill of Exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause, as a true, full, and correct Bill of Exceptions, and the clerk of this court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Filed Dec. 28, 1915.

EDWARD CUSHMAN,
Judge. [100]

General Order Continuing Court Matters Over Term, Made July 6, 1915.

IT IS NOW ORDERED that court stand adjourned *sine die,* and that all cases, motions, demurrers, and other matters now pending this court at Tacoma, Washington, and not now disposed of are continued until the next regular term hereof. [101]

Stipulation (to Withdraw Original Bill of Exceptions to Amend Same to Conform With Amendments Proposed by Plaintiff).

IT IS HEREBY STIPULATED by and between the parties hereto by their respective attorneys that the original Bill of Exceptions heretofore filed in the office of the clerk of the above-entitled court, in the above-entitled cause may be withdrawn for the purpose of making amendments thereto to conform to the amendments proposed by plaintiff herein. After

amendments made to be submitted to plaintiffs' attys. before submitted to Court for certificate.

TEATS, TEATS & TEATS,
Pltfs. Atty.
J. A. SHACKLEFORD and
F. D. OAKLEY,
Attorneys for Defendant.

(Filed Nov. 29, 1915.) [102]

Order (Allowing Withdrawal and Amendments of Proposed Bill of Exceptions.)

On stipulation of plaintiffs and defendant, by their respective attorneys,

IT IS HEREBY ORDERED that defendant herein be permitted to withdraw the original bill of exceptions heretofore filed in the above-entitled action for the purpose of making amendments thereto.

Done in open court this 29th day of November, 1915.

EDWARD E. CUSHMAN,
Judge.

(Filed Nov. 29, 1915.) [103]

Assignment of Errors.

The defendant Tacoma Railway and Power Company, a corporation, in connection with its Petition for a Writ of Error, files the following Assignment of Errors, upon which it will rely upon its prosecution of its Writ of Error in the above-entitled cause in the United States Circuit Court of Appeals for

the Ninth Circuit for relief from the judgment rendered in said cause:

I.

The Court erred in refusing to grant defendant's motion for a directed verdict upon each and every one of the grounds therein set forth.

II.

The Court erred in admitting the testimony of Oscar Helander over the objection of the defendant, as follows:

"Q. Did you find out while you were there what was the matter with the turnstile that you could not go.

A. No, sir, not until afterwards.

Q. Well afterwards, what did you find afterwards?

Mr. OAKLEY.—I object to that question, unless he can tell when he found it, to see how near it is to the time. [104]

Mr. TEATS.—Q. When was it?

A. Well, it was sometime after the accident.

Q. About how long after the accident?

A. I think it was about a week after the accident.

Mr. OAKLEY.—I object to that as being too remote.

The COURT.—Objection overruled; exception allowed. Only answer if you know from your own examination and observation, not from what somebody told you.

Mr. TEATS.—Q. What did you find?

A. I found one spoke of the turnstile was working almost against the other, or got down, or the whole turnstile had sunk down, rather, and that was the

cause of the turnstile not going clear around."

III.

The Court erred in permitting the plaintiffs to read testimony of Paul Jackson given at a former trial of this cause for the purposes of impeachment, without laying proper grounds for impeaching questions, as follows, to wit:

"Q. You were the length of two cars past the turnstile before your car stopped? A. Yes, sir.

Q. That is, the rear of your car was two lengths away from the turnstile? A. About that.

Q. That would be three times 45, or 135 feet after you passed the turnstile before you stopped your car? A. From where I was?

Q. Yes.

A. It would be around that some place." [105]

WHEREFORE defendant prays that the judgment of the Honorable District Court of the United States for the Western District of Washington, Southern Division, be reversed, and that such direction be given that full force and efficiency may inure to defendant by reason of defendant's defense to said cause.

J. A. SHACKLEFORD,
F. D. OAKLEY,
Attorneys for Defendant.

(Filed Dec. 13, 1915.) [106]

Petition for Writ of Error.

Comes now the defendant herein, Tacoma Railway and Power Company, and says that on or about the 12th day of June, 1915, this Court entered judgment

herein in favor of the plaintiff and against the defendant in the sum of $2,450, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

WHEREFORE, this defendant prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals.

And the defendant further petitions this Honorable Court for an order allowing it to prosecute a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be [107] made fixing the amount of security which this defendant shall give and furnish upon said Writ of Error, and that the judgment heretofore rendered be superseded and stayed, pending the determination of said cause in the Honorable Circuit Court of Appeals.

J. A. SHACKLEFORD,
F. D. OAKLEY,
Attorneys for Defendant.

(Filed Dec. 13, 1915.) [108]

Order Allowing Writ of Error.

On this 13th day of December, 1915, came the defendant herein, Tacoma Railway & Power Company, by its attorneys, and filed herein and present to the court its petition praying for the allowance of a Writ of Error, and praying also that a transcript of the record and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises, and said defendant having duly filed an Assignment of Errors intended to be urged by it and the Court being advised in the premises,

IT IS HEREBY ORDERED, that a Writ of Error be and is hereby allowed, to have reviewed, in the Honorable United States Circuit Court of Appeals for the Ninth Circuit, the judgment entered herein, and it is further ordered that the amount of the bond on said Writ of Error is hereby fixed at the sum of $5,000, to be given by the defendant, and upon the giving of said bond, the judgment heretofore rendered will be superseded pending the hearing of said cause, in the Honorable Circuit Court of Appeals.

IN WITNESS WHEREOF, the above order is granted and allowed this 13th day of December, 1915.

EDWARD E. CUSHMAN,
Judge.

(Filed Dec. 13, 1915.) **[109]**

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Tacoma Railway & Power Company, a corporation, the defendant above named, as principal, and Casualty Company of America, a corporation, organized under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the plaintiffs in the above-entitled action, William Cothary and Margaret Cothary, husband and wife, in the sum of Five Thousand ($5,000) Dollars, for which sum, well and truly to be paid to said William Cothary and Margaret Cothary, their executors, administrators, and assigns, we bind ourselves, our and each of our successors, and assigns, jointly and severally, firmly by these presents.

SEALED with our seals this 16th day of December, 1915.

THE CONDITION of this obligation is such that whereas, the above-named defendant, Tacoma Railway and Power Company, a corporation, has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States for the Western District of Washington, Southern Division, and whereas, the said TACOMA RAILWAY AND POWER COMPANY, desires to supersede said judgment and stay the issuance of execution thereon pending the determination of said cause in the said

United States Circuit Court of Appeals for the Ninth Circuit;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Tacoma Railway and Power Company, a corporation, shall prosecute said Writ of Error to effect, and **[110]** answer all costs and damages awarded against it, if it shall fail to make good its plea, then this obligation shall be void; otherwise the Court may enter summary judgment against said Tacoma Railway and Power Company and said surety for the amount of such costs and damages awarded against said Tacoma Railway and Power Company and this obligation to remain in full force and effect.

TACOMA RAILWAY AND POWER COMPANY,

By JNO. A. SHACKLEFORD,

President.

(Seal of Surety Co.)

CASUALTY COMPANY OF AMERICA.

By F. H. SWEETLAND,

Its Attorney in Fact.

Approved this 22d day of December, 1915.

EDWARD E. CUSHMAN,

Judge.

(Filed Dec. 22, 1915.) **[111]**

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States

District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the above-entitled cause, to wit, William Cothary and Margaret Cothary, husband and wife, vs. Tacoma Railway & Power Company, No. 1590, as the same remains of record and on file in my office, in the city of Tacoma, in said district, the same being made pursuant to praecipe of counsel filed herein, and the same constitutes my return on the annexed Writ of Error.

I further certify and return that I hereto attach and herewith transmit the original Writ of Error and Original Citation, herein, together with the original exhibits herein.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the plaintiff in error herein, for making the record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate and return, 267 folios @ 15¢ ea.....	40.05
Certificate of Clerk to transcript of record, 3 folios @ 15¢.....	.45
Seal to said Certificate.....	.20
Certificate and seal to original exhibits.....	.50

ATTEST my hand and the seal of the United States District Court for the Western District of Washington, at Tacoma, in said District, this 12th day of January, A. D. 1916.

[Seal] FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy Clerk. **[112]**

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1590.

TACOMA RAILWAY & POWER COMPANY, a Corporation,
Plaintiff in Error,
vs.
WILLIAM COTHARY and MARGARET COTHARY, Husband and Wife,
Defendants in Error.

Writ of Error (Original).

United States of America,

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Western District of Washington, Southern Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between William Cothary and Margaret Cothary, defendants in error, and Tacoma Railway & Power Company, a corporation, plaintiff in error, a mani-

fest error hath happened, to the great damage of the said Tacoma Railway & Power Company, plaintiff in error, as by its complaint herein appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that under your seal distinctly [113] and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, in said circuit, on thirty days from the date of this writ, in the said Circuit Court of Appeals, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 28th day of December, A. D. 1915.

[Seal] FRANK L. CROSBY,
Clerk of the United States District Court for the Western District of Washington, Southern Division.

By E. C. Ellington,
Deputy Clerk, U. S. District Court, Western District of Washington. [114]

Due service of the within and foregoing Writ of Error by the receipt of a true copy thereof, together with true copies of the exhibits recited therein as

being attached thereto, hereby is admitted in behalf of all parties entitled to such service by laws or by rules of court, this 28th day of December, 1915.

TEATS, TEATS and TEATS,
Attorneys for Deft. in Error.

[Endorsed]: No. 1590. In the United States Circuit Court of Appeals for the Ninth Circuit. Tacoma Railway & Power Company, a Corporation, Plaintiff in Error, vs. William Cothary and Margaret Cothary, Husband and Wife, Defendants in Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 28, 1915. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1590.

TACOMA RAILWAY & POWER COMPANY, a Corporation,
Plaintiff in Error,

vs.

WILLIAM COTHARY and MARGARET COTHARY, Husband and Wife,
Defendants in Error.

Citation (Original).

The United States of America,—ss.

The President of the United States of America, to William Cothary and Margaret Cothary, Defendants in Error, GREETING:

You are hereby cited and admonished to be and

appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said court, in the city of San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to Writ of Error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein Tacoma Railway & Power Company, a corporation, is plaintiff in error, and you, the said William Cothary and Margaret Cothary, are defendants in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected, and speedy justice done to the parties in that behalf. [115]

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 28th day of Dec. A. D. 1915.

[Seal] EDWARD E. CUSHMAN,
Judge of the United States District Court for the Western District of Washington, Southern Division.

Service of the above and foregoing Citation is hereby acknowledged this 28th day of December, A. D. 1915.

TEATS, TEATS and TEATS,
Attorneys for Defendant in Error. [116]

[Endorsed]: No. 1590. In the United States Circuit Court of Appeals. Tacoma Railway & Power Company, a Corporation, Plaintiff in Error, vs. William Cothary and Margaret Cothary, Husband and Wife, Defendants in Error. Filed in the U. S.

District Court, Western Dist. of Washington, Southern Division. Dec. 28, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2736. United States Circuit Court of Appeals for the Ninth Circuit. Tacoma Railway & Power Company, a Corporation, Plaintiff in Error, vs. William Cothary and Margaret Cothary, Husband and Wife, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed January 15, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.